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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 42

JOSEPH J. WEISS, MARTIN GROSS, DR. GEORGE KRUPP AND DR. MAXIMILIAN GOLDSTEIN, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 6, 1939.

CERTIORARI GRANTED JUNE 5, 1939.

SUPREME COURT OF THE UNITED STATES

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IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

INDICTMENT

Southern District of New York, ss: The Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for that district, upon their oath present:

That heretofore, to wit, on or about the 15th day of January, 1934 and continuously thereafter up to the date of the filing of this indictment, in the Southern District of New York and within the jurisdiction of this Court, Joseph J. Weiss, Alfred L. Weiss, Martin Gross, Dr. Hirsch L. Messman, Dr. Maximilian Goldstein, Dr. George Krupp, Benjamin Nelson, Herman Berger and Morris Spitz, the defendants herein, and divers other persons whose names are to the Grand Jurors unknown, unlawfully, willfully and knowingly devised and intended to devise a scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises from life and health and accident insurance companies including the Metropolitan Life Insurance Company, The Equitable Life Assurance Society of the United States; The Prudential Insurance Company of America, The Mutual Life Insurance Company of New York, the New York Life Insurance Company, The Massachusetts Protective Association, Inc., The Maccabees, The Travelers Insurance Company and the Mutual Benefit Health & Accident Association, hereinafter referred to as the victims, by inducing and attempting to induce said victims by false and fraudulent pretenses, representations and promises to give, advance, loan, pay and deliver their money and property to said defendants in payment and settlement of false and fraudulent claims for disability and health and accident benefits on policies of insurance, in that the said defendants would cause the holders of said policies of insurance, hereinafter referred to as the claimants, to file with the said victims false and fraudulent [fol. 5] claims for disability and health and accident benefits, and would falsely and fraudulently create and manufacture and aid in the creation and manufacture of false and ficti-

tious histories, diagnoses and ailments for the said claimants which would deceive the victims and falsely and fraudulently induce them to part with their money and property in the belief that said claimants were in truth and in fact permanently and totally disabled, by the means and in the manner hereinafter described.

It was a part of said scheme and artifice to defraud that the defendants Joseph J. Weiss and Alfred L. Weiss would maintain law offices known as the law offices of J. J. & A. L. Weiss, in the Borough of Manhattan, City of New York, and would lend the facilities of their offices to, and advise, counsel, handle, supervise and aid in the presentation to, and obtaining the approval by, the victims of false and fraudulent claims for disability and health and accident benefits on policies of insurance, which said claims the defendants Joseph J. Weiss and Alfred L. Weiss then and there knew to be in all respects false and fraudulent.

It was further a part of said scheme and artifice to defraud that the defendants Joseph J. Weiss and Alfred L. Weiss would, on occasions, pay the expenses incident to the creation and fabrication of the aforementioned fraudulent claims, make payments of insurance premiums, payments to various doctors for certifying to, and aiding in obtaining the approval by, the victims of the said fraudulent claims, payments to hospitals for fraudulent hospitalization and divers other incidental expenses to the Grand Jurors unknown.

It was further a part of said scheme and artifice to defraud that the defendant Martin Gross, hereinafter referred to as a "chaser", would seek out and bring to the law offices of the defendant- Joseph J. Weiss and Alfred L. Weiss the defendant Benjamin Nelson who held policies of life insurance containing provisions entitling him to payment of disability benefits only in the event of permanent and total disability, and policies of health and accident insurance, for [fol. 6] the purpose of having the said defendant Benjamin Nelson file false and fraudulent claims for disability and health and accident benefits in the manner hereinafter described, and, in return therefor, the defendant Martin Gross would be compensated by the defendants in amounts to the Grand Jurors unknown in the event the said insurance claims were paid by the victims.

It was further a part of said scheme and artifice to defraud that the defendant Benjamin Nelson would seek out with the

aid of the defendant Martin Gross the defendants Herman Berger and Morris Spitz who held policies of life and health and accident insurance containing provisions similar to those in the insurance policies of the defendant Benjamin Nelson, and bring said defendants Herman Berger and Morris Spitz to the law offices of the defendants Joseph J. Weiss and Alfred L. Weiss for the purpose of having said defendants Herman Berger and Morris Spitz file false and fraudulent claims for disability and health and accident benefits in the manner hereinafter described, and in return therefor the defendants Benjamin Nelson and Martin Gross would be compensated by the defendants in amounts to the Grand Jurors unknown in the event said insurance claims were paid by the victims.

It was further a part of said scheme and artifice to defraud that the defendants would create and manufacture and aid in the creation and manufacture of false, simulated and fictitious ailments for the defendants Benjamin Nelson, Herman Berger and Morris Spitz which would deceive the doctors and other representatives of the victims and induce said victims to part with their money and property in the belief that said claimants were actually permanently and totally disabled.

It was further a part of said scheme and artifice to defraud that the defendants Benjamin Nelson, Herman Berger and Morris Spitz, with the knowledge and consent of the codefendants, would file false and fraudulent claims with various life and health and accident insurance companies as follows: Benjamin Nelson with the Metropolitan Life Insurance Company, The Prudential Insurance Company [fol. 7] of America, The Maccabees and The Equitable Life Assurance Society of the United States; Herman Berger with the Metropolitan Life Insurance Company, The Maccabees and The Massachusetts Protective Association, Inc., and Morris Spitz with the New York Life Insurance Company, The Travelers Insurance Company, The Equitable Life Assurance Society of the United States, The Mutual Life Insurance Company of New York, The Maccabees and the Mutual Benefit Health & Accident Association, respectively, with which said companies the said defendants Benjamin Nelson, Herman Berger and Morris Spitz held policies of life and health and accident insurance entitling them to payments in various sums in the event of their permanent and total disability which said claims would falsely

and fraudulently state that said defendants were suffering from various diseases and ailments of the heart of a permanently and totally disabling character and that said diseases and disability had existed for a long period of time prior to the filing of said claims, to wit, the defendant Benjamin Nelson since approximately the 13th day of June 1935, Herman Berger since approximately the 10th day of December, 1936, and Morris Spitz since approximately the month of December, 1936, whereas in truth and in fact, as the defendants then and there well knew, they were not suffering from any of the said diseases and ailments, nor had they been so suffering since the dates specified in said claims and the said claims were false and fraudulent.

It was further a part of said scheme and artifice to defraud that the defendants would advise, instruct and coach the Defendants Benjamin Nelson, Herman Berger and Morris Spitz as to the history and symptoms of various diseases and ailments of the heart and that the said defendants Benjamin Nelson, Herman Berger and Morris Spitz, with the knowledge and consent of the codefendants, would falsely and fraudulently represent and pretend to the doctors and other representatives of the victims that they suffered from the following: squeezing pain in the left chest with the pain radiating up to the left shoulder and down to the left hand, numbness of the fingers, feat of impending death, cold sweats, shortness of breath, frequent attacks of dizziness, weakness, recurring tired spells, frequent nocturnal urination, palpitation of the heart and discomfort at night when [fol. 8] not sleeping in an upright position, for the purpose of deceiving the doctors and other representatives of the victims into making diagnoses that the said defendants were suffering from diseases and ailments of the heart of a permanently and totally disabling character, whereas in truth and in fact, as the defendants then and there well knew, the said defendants Benjamin Nelson, Herman Berger and Morris Spitz were not suffering from the aforesaid symptoms.

It was further a part of said scheme and artifice to defraud that the defendants Benjamin Nelson, Herman Berger and Morris Spitz, with the knowledge and consent of the codefendants, would undergo fraudulent hospitalization at the Sydenham, Wadsworth and Park East Hospitals respectively, for false, simulated and fictitious diseases and ailments of the heart, and would feign and simulate heart attacks and complain of various symptoms of heart disease

while remaining at the aforesaid hospitals, for the purpose of establishing hospital records and making it appear to the victims that said defendants were suffering from diseases and ailments of the heart of a permanently and totally disabling character, whereas in truth and in fact, as the defendants then and there well knew, the defendants Benjamin Nelson, Herman Berger and Morris Spitz did not suffer from any heart attacks or have any of the various symptoms of heart disease as falsely and fraudulently pretended by them.

It was further a part of said scheme and artifice to defraud that the defendants Dr. Hirsch L. Messman, Dr. Maximilian Goldstein and Dr. George Krupp, with the knowledge and consent of the codefendants, would falsely and fraudulently certify to the victims as to the dates and occasions on which said defendant doctors first treated the defendants Benjamin Nelson, Herman Berger and Morris Spitz for the aforesaid symptoms, diseases and ailments of the heart, and as to the dates and occasions of subsequent treatments, whereas in truth and in fact, as the defendants then and there well knew, the defendants Dr. Hirsch L. Messman, Dr. Maximilian Goldstein and Dr. George Krupp did not treat the defendants Benjamin Nelson, Herman Berger and Morris Spitz on the dates specified in said [fol. 9] certificates, nor on any other dates, for any of the aforesaid symptoms, diseases and ailments of the heart, and said certificates were false and fraudulent.

It was further a part of said scheme and artifice to defraud that the defendants Benjamin Nelson and Herman Berger, with the knowledge and consent of the codefendants, would medicate themselves by taking pills containing digitalis or some derivative thereof, and other drugs to the Grand Jurors unknown, prior to the taking of electrocardiograms for the false and fraudulent purpose of creating electrocardiograms which would record irregularities of, and damage to, their hearts.

It was further a part of said scheme and artifice to defraud that prior to the required examinations by the doctors employed by the various victims, the defendants Benjamin Nelson and Herman Berger, with the knowledge and consent of the codefendants, would take pills containing digitalis or some derivative thereof, and other drugs to the Grand Jurors unknown, and do various things which would affect the normal function of the heart so that in the event the doctors employed by the respective victims desired to take

electrocardiograms or make physical examinations of the said defendants Benjamin Nelson and Herman Berger, said electrocardiograms and physical examinations would falsely and fraudulently record and disclose irregularities of, and damage to, their hearts.

It was further a part of said scheme and artifice to defraud that the defendants Herman Berger and Morris Spitz, prior to the filing of their said fraudulent claims, with the knowledge and consent of the codefendants, would submit to examinations by eminent heart specialists with high standing in the medical profession, and seek their opinions of the result of said examinations, and would, if said opinions were favorable, submit the same to the respective victims.

It was further a part of said scheme and artifice to defraud that the defendants Herman Berger and Morris Spitz, with the knowledge and consent of the codefendants, would falsely and fraudulently represent and pretend to the said specialists that they suffered from the various symptoms [fol. 10] and diseases of the heart hereinbefore set forth, and further, the defendant Herman Berger, prior to the examinations by said specialists, would falsely and fraudulently medicate himself by taking pills containing digitalis or some derivative thereof and other drugs to the Grand Jurors unknown, so that the electrocardiograms taken by the said specialists would record irregularities of, and damage to his heart, and the said defendants Herman Berger and Morris Spitz would thereby deceive the said specialists into diagnosing and certifying that they were suffering from various diseases of the heart of a permanently and totally disabling character, whereas in truth and in fact, as the defendants then and there well knew, the defendants Herman Berger and Morris Spitz did not suffer from any of the symptoms or diseases aforementioned.

It was further a part of said scheme and artifice to defraud that the defendants Joseph J. Weiss and Alfred L. Weiss would charge and deduct certain amounts of money, the exact amounts being to the Grand Jurors unknown, from the various sums paid by the respective victims on the false and fraudulent claims filed by and on behalf of the defendants Benjamin Nelson, Herman Berger and Morris Spitz.

And all the aforesaid representations, pretenses and promises were in fact made, which representations, pre-

tenses and promises were false and fraudulent and without foundation in fact, to the knowledge of the defendants Joseph J. Weiss, Alfred L. Weiss, Martin Gross, Dr. Hirsch L. Messman, Dr. Maximilain Goldstein, Dr. George Krupp, Benjamin Nelson, Herman Berger and Morris Spitz, and such false and fraudulent representations, pretenses and promises were intended by the defendants to be false and fraudulent at the time made and were intended thereby to deceive and defraud the said victims, and induce said victims to part with their money and property, it being the purpose and plan of said defendants to obtain the said money and property from said victims and to convert and appropriate the same to their own use and benefit in various amounts to the Grand Jurors unknown.

[fol. 11] And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the Southern District of New York and within the jurisdiction of this Court, on or about the 27th day of March 1937 did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern District of New York, to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a letter dated March 27, 1937, signed "Irma Spitz," enclosed in a postpaid envelope, addressed to:

Mutual Life Ins. Co.,
34 Nassau Street,
New York.

which letter referred to the disability claim of Morris Spitz; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Section 338, Title 18, U. S. C.; Section 215 U. S. C. C.)

Second Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the Southern District of New York and within the jurisdiction of this Court, on or about the 27th day of March 1937 did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern District of New York, to be sent and delivered by the Post Office [fol. 12] Establishment of the United States, a certain writing, to wit, a letter dated March 27, 1937, signed "Irma Spitz," enclosed in a postpaid envelope, addressed to:

Massachusetts Mutual Life Ins. Co.
Springfield, Mass.

which letter referred to the disability claim of Morris Spitz; against the peace of the United States and their dignity and contrary to the form of the Statute of the United States in such case made and provided (Section 338, Title 18, U. S. C.; Section 215 U. S. C. C.).

Third Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the Southern District of New York and within the jurisdiction of this Court, on or about the 27th day of March 1937 did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern District of New York, to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a letter dated March 27, 1937, signed "Irma Spitz," enclosed in a postpaid envelope, addressed to:

Equitable Life Assurance Society
393 Seventh Ave.
New York, N. Y.

which letter referred to the disability claim of Morris Spitz; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, [fol. 13] U. S. C.; Section 215 U. S. C. C.)

Fourth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the Southern District of New York and within the jurisdiction of this Court, on or about the 27th day of March 1937 did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern District of New York to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a letter dated March 27, 1937, signed "Irma Spitz," enclosed in a postpaid envelope, addressed to:

New York Life Ins. Co.
51 Madison Avenue
New York, N. Y.

which letter referred to the disability claim of Morris Spitz; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Section 338, Title 18 U. S. C.; Section 215 U. S. C. C.)

Fifth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment except

the allegations contained in the last paragraph of the First [fol. 14] Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count,

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the Southern District of New York and within the jurisdiction of this Court, on or about the 27th day of March 1937 did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern District of New York, to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a letter dated March 27, 1937, signed "Irma Spitz," enclosed in a postpaid envelope, addressed to:

The Travelers Ins. Co.
Hartford, Conn.

which letter referred to the disability claim of Morris Spitz; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215 U. S. C. C.)

Sixth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 6th day of April 1937 did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern [fol. 15] District of New York, to be sent and delivered by the Post Office Establishment of the United States, a cer-

tain writing, to wit, a letter signed "Morris Spitz," enclosed in a postpaid envelope, addressed to:

Equitable Life Assurance Society,
393 Seventh Avenue,
New York, N. Y.

which said letter referred to an authorization to the Equitable Life Assurance Society for information concerning treatment of claimant Morris Spitz; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215 U. S. C. C.)

Seventh Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 18th day of April 1937 did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern District of New York, to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a letter dated April 18, 1937 signed "Morris Spitz," enclosed in a postpaid envelope, addressed to:

Equitable Life Assur. Soc.,
393 Seventh Avenue,
New York, N. Y.

enclosing therewith claimant's statement of disability claim [fol. 16] and medical reports referring thereto; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215 U. S. C. C.)

Eighth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment, except the allegations contained in the last paragraph of the First Count beginning with the words, "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 19th day of May 1937 did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern District of New York, to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a letter dated May 17, 1937 signed "Morris Spitz," enclosed in a postpaid envelope, addressed to:

Mutual Life Ins. Co.,
34 Nassau Street,
New York, N. Y.

which letter referred to the disability of Morris Spitz; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215 U. S. C. C.)

Ninth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment, except [fol. 17] the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 21st

day of June, 1935, did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern District of New York, to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a letter dated June 21, 1935 signed "Benjamin H. Nelson," enclosed in a postpaid envelope addressed to:

The Equitable Life Assurance Soc.,
393 Seventh Avenue,
New York, N. Y.

which said letter referred to the claim for health and accident benefits of Benjamin H. Nelson; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215, U. S. C. C.)

Tenth Count

And the Grand Jurors aforesaid, upon their oath aforesaid further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment, except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 16th [fol. 18] day of April, 1936, did unlawfully, wilfully and knowingly cause to be delivered by mail according to the directions thereon by the Post Office Establishment of the United States, a certain writing, to wit, a letter dated April 15, 1936, signed "J. J. & A. L. Weiss by Joseph J. Weiss," enclosed in a postpaid envelope, addressed to:

Metropolitan Life Insurance Company
1 Madison Avenue
New York City

which said letter referred to the disability claim of Benjamin Nelson; against the peace of the United States and

their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S .C.; Section 215, U. S. C. C.)

Eleventh Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment, except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendant herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 23rd day of April 1936, did unlawfully, wilfully and knowingly cause to be delivered by mail according to the directions thereon by the Post Office Establishment of the United States, a certain writing, to wit, a letter dated April 22, 1936, signed "J. J. & A. L. Weiss by Joseph J. Weiss," enclosed in a postpaid envelope addressed to:

Metropolitan Life Insurance Co.,
1 Madison Avenue,
New York City

which said letter referred to checks for disability benefits [fol. 19] in the disability claim of Benjamin Nelson; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215 U. S. C. C.)

Twelfth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment, except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 2nd day of May 1935 did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern District of New York, to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a letter signed "Mrs. B. Nelson," enclosed in a postpaid envelope, addressed to:

Equitable Life Assurance Society,
393 Seventh Avenue,
New York, N. Y.

which letter referred to the alleged sickness of the claimant Benjamin Nelson, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 330, Title 18, U. S. C.; Section 215 U. S. C. C.)

Thirteenth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allega- [fol. 20] tions contained in the First Count of this indictment except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants, herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 21st day of October, 1936 did unlawfully, wilfully and knowingly cause to be delivered by mail according to the directions thereon by the Post Office Establishment of the United States, a certain letter to wit, a certificate of attending physician dated October 16, 1936 signed "Hirsch L. Messman, M. D.," enclosed in a postpaid envelope, addressed to:

Equitable Life Assurance Society of U. S.,
393 Seventh Avenue,
New York City

and referred to the disability claim and alleged illness of Benjamin Nelson; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215, U. S. C. C.)

Fourteenth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment, except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, [fol. 21] at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 15th day of February, 1937 did unlawfully, wilfully and knowingly cause to be delivered by mail according to the directions thereon by the Post Office Establishment of the United States, a certain writing, to wit, a letter, dated February 12, 1937, signed "Herman Berger," enclosed in a postpaid envelope, addressed to:

Metropolitan Life Insurance Co.,
1 Madison Avenue,
New York City.

which letter referred to the alleged sickness of the claimant Herman Berger; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215 U. S. C. C.)

Fifteenth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 18th day of February 1937 did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern District of New York, to be sent and delivered by the Post Office Establishment of the United States, a certain writing to wit, a letter dated February 18, 1937 from the Metropolitan Life Insurance Company; signed "E. J. Spellman, Supervisor," enclosed in a postpaid envelope, addressed to:

[fol. 22] Mr. Herman Berger,
79 Amherst Street,
Brooklyn, N. Y.

which letter referred to the claim for total disability of Herman Berger; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215 U. S. C. C.)

Sixteenth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment, except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 2nd day of April 1937 did unlawfully, wilfully, and knowingly cause to be delivered by mail according to the directions thereon by the Post Office Establishment of the United States, a certain writing, to wit, a letter signed "Herman Berger," enclosed in a postpaid envelope, addressed to:

Metropolitan Life Insurance Co.,
1 Madison Avenue,
New York, N. Y.

containing attending physicians certificates and referring to the alleged illness of the claimant Herman Berger; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215 U. S. C. C.)

Seventeenth Count

[fol. 23] And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 5th day of April, 1937 did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern District of New York, to be sent and delivered by the Post Office Establishment of the United Sta-es, a certain writing, to wit, a letter dated April 5, 1937 from the Metropolitan Life Insurance Company, signed "E. J. Spellman, Supervisor," enclosed in a postpaid envelope addressed to:

Mr. Herman Berger,
79 Amherst Street,
Brooklyn, N. Y.

which letter referred to two attending physicians' statements enclosed in said letter and forwarded by claimant Herman Berger; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215, U. S. C. C.)

Eighteenth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allega-

tions contained in the First Count of this indictment except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of [fol. 24] executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 4th day of May, 1937 did unlawfully, wilfully and knowingly cause to be delivered by mail according to the directions thereon by the Post Office Establishment of the United States, a certain writing, to wit, a letter dated May 3, 1937, signed "Joseph J. Weiss," enclosed in a postpaid envelope addressed to:

Massachusetts Protective Association, Inc.,
19 West 44th Street,
New York City

which letter referred to retainer in connection with the disability claim of Herman Berger; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215, U. S. C. C.).

Nineteenth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 4th day of February, 1937 did unlawfully, wilfully and knowingly cause to be delivered by mail according to the directions thereon by the Post Office Establishment of the United States, a certain writing, to wit, a letter dated February 3, 1937 from the Park East Hospital, signed "H. B. Phillips,

[fol. 25] M.D.," enclosed in a postpaid envelope addressed to:

Dr. H. L. Messman,
315 Central Park West,
New York City

which said letter referred to the alleged illness of Morris Spitz; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215 U. S. C. C.)

Twentieth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that heretofore, to wit, on or about the 15th day of January 1934, and continuously thereafter up to the date of the filing of this indictment, in the City, State and Southern District of New York and within the jurisdiction of this Court, Joseph J. Weiss, Alfred L. Weiss, Martin Gross, Dr. Hirsch L. Messman, Dr. Maximilian Goldstein, Dr. George Krupp, Benjamin Nelson, Herman Berger and Morris Spitz, the defendants herein, and divers other persons whose names are to the Grand Jurors unknown, unlawfully, wilfully and knowingly conspired, combined, confederated and agreed together and with each other and with divers other persons to the Grand Jurors unknown, to commit an offense against the United States, to wit, to violate Title 18, Section 338, United States Code, in the manner and by the means described in Count One of this indictment beginning with the words in the third paragraph "It was a part of said scheme and artifice to defraud that the defendants Joseph J. Weiss and Alfred L. Weiss would maintain," and continuing through the last paragraph of Count One, said paragraph beginning with the words "And for the purpose of executing said scheme and artifice to defraud," each and every allegation contained in said portion of Count One being reaffirmed, realleged and incorporated herein as if set forth in full.

Overt Acts

1. In pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and [fol. 26] within the jurisdiction of this Court, during the

month of September, 1934, the defendants Martin Gross, Benjamin Nelson and Dr. Hirsch L. Messman had a conversation at the office of the defendant Dr. Hirsch L. Messman, 2396 Morris Avenue, Bronx, N. Y.

2. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in or about the month of February, 1935, the defendant Morris Spitz signed two applications for life insurance policies with a certain insurance company, namely, The Maccabees.

3. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, during the month of December, 1934, the defendant Dr. Hirsch L. Messman administered to the defendant Benjamin Nelson pills containing digitalis or some derivative thereof.

4. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 19th day of December, 1934, the defendant Dr. Hirsch L. Messman and the defendant Benjamin Nelson had a conversation with the defendant Dr. Maximilain Goldstein at the office of the defendant Dr. Maximilain Goldstein, 829 Park Avenue, New York City.

5. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 19th day of December, 1934, the defendant Dr. Maximilian Goldstein took an electrocardiogram of the defendant Benjamin Nelson.

6. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 19th day of December, 1934, the defendants Benjamin Nelson and Dr. Hirsch L. Messman went to the Sydenham Hospital at 123rd Street and Manhattan Avenue, in the City and State of New York, where the defendant Benjamin [fol. 27] Nelson was admitted for hospitalization.

7. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about

the 22nd day of December, 1934, the defendant Dr. Maximilian Goldstein visited said defendant Benjamin Nelson at said hospital.

8. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in or about the month of March, 1936, the defendants Benjamin Nelson, Martin Gross, Morris Spitz and Joseph J. Weiss had a conversation in the law offices of J. J. & A. L. Weiss, 276 Fifth Avenue, New York City.

9. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in or about the month of September, 1936, the defendants Benjamin Nelson, Martin Gross, Morris Spitz and Dr. Hirsch L. Messman had a conversation on Broadway at approximately 77th Street, New York City.

10. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in or about the month of December, 1936, the defendants Benjamin Nelson, Martin Gross, Morris Spitz and Joseph J. Weiss had a conversation at the law offices of J. J. & A. L. Weiss, 276 Fifth Avenue, New York City.

11. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 9th day of September, 1935, the defendant Benjamin Nelson signed a claimant's statement to the Equitable Life Assurance Society.

12. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 19th day of September, 1935, the defendant Dr. Hirsch L. Messman signed a physician's statement to the Equitable Life Assurance Society relating to the disability of the defendant Benjamin Nelson.

[fol. 28] 13. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 23rd day of September, 1935, the defendant Dr.

Maximilian Goldstein signed a physician's statement to the Equitable Life Assurance Society, relating to the disability of the defendant Benjamin Nelson.

14. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 18th day of December, 1936, the defendant Dr. Hirsch L. Messman signed a physician's statement to the Metropolitan Life Insurance Company relating to the disability of the defendant Benjamin Nelson.

15. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 18th day of April, 1937, the defendant Morris Spitz signed a claimant's statement to the Equitable Life Assurance Society.

16. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 13th day of April, 1937, the defendant Dr. George Krupp signed a physician's statement to the Equitable Life Assurance Society relating to the disability of the defendant Morris Spitz.

17. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 13th day of April, 1937, the defendant Dr. Hirsch L. Messman signed a physician's statement to the Equitable Life Assurance Society, relating to the disability of the defendant Morris Spitz.

18. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 16th day of January, 1937, the defendants Morris Spitz and Dr. Hirsch L. Messman went to the Park East Hospital at 112 East 83rd Street, New York City, where the defendant Morris Spitz was admitted for hospitalization.

[fol. 29] 19. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in or about the month of December, 1936, the defendants Alfred L. Weiss, Joseph J. Weiss, Dr. Hirsch L. Messman, Ben-

jamin Nelson and Martin Gross had a conversation at the law offices of J. J. & A. L. Weiss, 276 Fifth Avenue, New York City.

20. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 25th day of December, 1936, the defendants Herman Berger and Dr. Hirsch L. Messman went to the Wadsworth Hospital, 629 West 185th Street, New York City, where the said defendant Herman Berger was admitted for hospitalization.

21. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in or about the month of January, 1937, the defendants Alfred L. Weiss and Dr. Hirsch L. Messman had a conversation at the law offices of J. J. & A. L. Weiss, 276 Fifth Avenue, New York City.

22. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 12th day of March, 1937, the defendant Alfred L. Weiss had a telephone conversation with the defendant Herman Berger.

23. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 4th day of March, 1937, the defendants Dr. George Krupp and Morris Spitz had a conversation at the home of the defendant Morris Spitz, 1187 Anderson Avenue, New York City.

24. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 4th day of March, 1937, the defendant Dr. Hirsch L. [fols. 30-33] Messman spoke to the defendants Morris Spitz and Dr. George Krupp on the telephone.

25. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 4th day of March, 1937, the defendants Morris Spitz,

Dr. George Krupp, Dr. Hirsch L. Messman and Joseph J. Weiss had a conversation at the law offices of J. J. & A. L. Weiss, 276 Fifth Avenue, New York City.

26. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 25th day of March, 1937, the defendants Benjamin Nelson and Dr. Hirsch L. Messman had a conversation at the office of the defendant Dr. Hirsch L. Messman, 315 Central Park West, New York City.

27. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 25th day of March, 1937, the defendant Dr. Hirsch L. Messman spoke on the telephone to the defendant Joseph J. Weiss.

28. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in or about the month of January, 1937, the defendants Joseph J. Weiss, Dr. Hirsch L. Messman, Martin Gross, Benjamin Nelson and Dr. George Krupp had a conversation at the law offices of J. J. & A. L. Weiss, 276 Fifth Avenue, New York City.

Against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 88, Title 18, U. S. C.)

Lamar Hardy, United States Attorney.

[fol. 34] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

JOSEPH J. WEISS, ALFRED L. WEISS, MARTIN GROSS, DR. HIRSCH L. MESSMAN, Dr. Maximilian Goldstein, Dr. George Krupp, Benjamin Nelson, Herman Berger and Morris Spitz

Violation of using the mails in a scheme to defraud and conspiracy so to do.

Section 88, 338, Title 18 U. S. C.

DOCKET ENTRIES

7/30/37 Filed indictment.
8/ 2/37 Docketed discharge as to Hirsch Messman dated May 22, 1937, filed May 26th, 1937.
8/12/37 Filed notice of appearance for Dr. Krupp by A. Males and S. Schwartz, attorneys.
Filed notice of appearance for Dr. Maximilian Goldstein by Schwartz & Frohlich, attorneys.
8/17/37 Joseph J. Weiss pleads not guilty. Bail continued.
Alfred L. Weiss pleads not guilty. Bail continued.
Martin Gross pleads not guilty. Bail continued.
Dr. George Krupp pleads not guilty. Bail continued.
Benjamin Nelson pleads guilty.
Herman Berger pleads guilty.
Morris Spitz pleads guilty.
Sentence adjourned to September 17th, 1937; bail continued as to defendants Berger and Spitz; defendant Nelson paroled. Hulbert, J.
8/20/37 Maximilian Goldstein pleads not guilty. Bail $1500 to cover C 100/452-454-463 and 456.
[fol. 35] Paroled to 4 P. M. to give bail. Hulbert, J.
Filed recognizance for Maximilian Goldstein $1500 to cover C 100/452-454-456 and 463. Continental Casualty Co. surety.

Docket Entries—Continued

8/24/37 Filed petition and notice of motion to return and suppress seized property of defendant Martin Gross.
Filed affidavit in opposition to motion.

8/24/37 Filed opinion of Hulbert, J. #10845. Motion denied.

8/26/37 Herman Berger bail reduced to $100 on motion of Government. Hulbert, J.

8/31/37 Filed recognizance for Herman Berger $100 cash.

9/13/37 Filed affidavit and notice of motion for a bill of particulars as to defendant Dr. George Krupp. Memo endorsed. Motion argued. Motion denied. Kennedy, J.

9/18/37 Filed order denying motion for bill of particulars as to Dr. George Krupp. Kennedy, J.

11/ 4/37 Docketed M. Gross bond filed 8/11/37.
" M. Spitz bond filed 8/11/37.
" J. J. Weiss bond filed 8/11/37.
" A. L. Weiss bond filed 8/11/37.
" B. Nelson bond filed 8/11/37.
" H. Berger bond filed 8/11/37.

11/18/37 Docketed G. Krupp bond filed 8/11/37.

11/29/37 Filed affidavit and order to show cause for an order granting re-argument of application of Martin Gross for return of papers and records seized. Memo endorsed dated December 6th, 1937. Motion for re-argument granted and petition denied. See opinion etc. Hulbert, J.
Filed affidavit of Frank E. Shea in opposition to motion.

[fol. 36] Filed opinion #11040 granting motion of Martin Gross for re-argument and denying prayer of petitioner. Hulbert, J.

1/ 6/38 The Government moves to sever as to H. L. Messman, B. Nelson, H. Berger and M. Spitz. No opposition. Motion granted. Trial begins as to the remaining defendants before Patterson, J.

1/ 7/38 Trial continued.

1/10/38 Trial continued.

Docket Entries—Continued

1/11/38 Trial continued.

Filed and entered order denying motion for return of papers and suppression of evidence as to M. Gross. Hulbert, J.

1/12/38 Trial continued.
1/13/38 Trial continued.
1/14/38 Trial continued.
1/17/38 Trial continued.
1/18/38 Trial continued.
1/19/38 Trial continued.
1/20/38 Trial continued.
1/21/38 Trial continued.
1/24/38 Trial continued.
1/25/38 Trial continued.
1/26/38 Trial continued.
1/27/38 Trial continued.
1/28/38 Trial continued.
1/31/38 Trial continued.
2/ 2/38 Trial continued.
2/ 3/38 Trial continued.
2/ 4/38 Trial continued.
2/ 7/38 Trial continued.
2/ 8/38 Trial continued.

[fol. 37]

2/ 9/38 Trial continued.
2/10/38 Trial continued.
2/11/38 Trial continued.
2/14/38 Trial continued.

Government moves to dismiss counts 8 and 12 as to all defendants. Motion granted. Government rests. Counsel for A. L. Weiss and J. J. Weiss moves to dismiss the indictment and each of the remaining counts in the indictment. Decision reserved. Counsel for defendants M. Gross and G. Krupp make the same motions. Decision reserved. Counsel for Dr. Goldstein moves to dismiss the indictment and each count of the remaining counts except count 20. Decision reserved.

Docket Entries—Continued

2/15/38 On behalf of Dr. Krupp the court grants the motion to dismiss counts 9-10-11 and 13. All other motions as to all defendants denied. Exc. Trial continued.

2/16/38 Trial continued.

2/17/38 Trial continued.

2/18/38 Trial continued.

2/21/38 Alfred L. Weiss being ill the court is adjourned to February 23rd, 1938.
Filed order to have physician examine A. L. Weiss. Patterson, J.

2/23/38 Government moves to sever as to A. L. Weiss and to declare a mistrial as to A. L. Weiss. Motion granted. Trial continued as to the remaining defendants.

2/24/38 Trial continued.

2/25/38 Trial continued.

2/28/38 Trial continued.

3/ 1/38 Trial continued. Both sides rest. All defendants move for a dismissal of the indictment on each count thereof and for a directed ver-
[fol. 38] dict of acquittal. Denied exception. Mr. Kiendl on behalf of Dr. Goldstein sums up.

3 /2/38 Trial continued. Mr. S. Schwartz, Mr. Friedman, Mr. Stryker sums up for their clients. The Government sums up.

3/ 3/38 Government sums up. Court charges. Jury retires. Partial verdict returned. J. J. Weiss guilty as charged. Martin Gross guilty as charged. Jury polled. Jury retires for further deliberation. Bails as to Weiss and Gross continued until March 4, 1938. Jury retires for night.

3/ 4/38 Verdict—Dr. Goldstein guilty as charged. Dr. Krupp guilty as charged. Defendants move to set aside verdict. Denied exception. Sentences adjourned until March 7th, 1938. Bails continued. Patterson, J.

Docket Entries—Continued

3/ 7/38 Filed judgment—Martin Gross 3 years on each of counts 1-2-3-4-5-6-7-9-10-11-13-14-15-16-17-18-19. 2 years on count 20. All sentences to run concurrently and to be served at a penitentiary to be designated by Attorney-General. Bail continued pending appeal.

Filed judgment—Joseph J. Weiss 3 years on each of counts 1-2-3-4-5-6-7-9-10-11-13-14-15-16-17-18-19. 2 years on count 20. All sentences to run concurrently and to be served at a penitentiary to be designated by the Attorney-General. Bail continued.

3/ 7/38 Filed judgment—Maximilian Goldstein 1 year and 1 day on each of counts 1-2-3-4-5-6-7-9-10-11-13-14-15-16-17-18-19-20. All sentences to run concurrently and to be served at a penitentiary to be designated by the Attorney-General. Bail continued pending appeal.

Filed judgment—George Krupp 1 year and 1
[fol. 39] day of each of counts 1-2-3-4-5-6-7-14-15-16-17-18-19-20. All sentences to run concurrently and to be served at a penitentiary to be designated by the Attorney-General. Bail continued pending appeal.

Filed judgment—Herman Berger 2 years on each of counts 1 to 20 inclusive. Sentences to run concurrently. Execution of sentences suspended. Defendant placed on probation for a period of 2 years subject to the standing probation order of this court.

Filed judgment—Morris Spitz 2 years on each of counts 1 to 20 inclusive. Sentences to run concurrently. Execution of sentences suspended. Defendant placed on probation for a period of 2 years subject to the standing probation order of this court. Patterson, J. Issued commitments in triplicate.

3/ 8/38 Defendants Joseph J. Weiss and Maximilian Goldstein paroled in their own recognizance pending appeal. Patterson, J.

Docket Entries—Continued

3/ 9/38 Bail fixed at $1500 as to Dr. George Krupp pending appeal. Paroled to give bail. Old bail ordered discharged upon filing bond of $1500. Patterson, J.

3/11/38 Filed notice of appeal as of Joseph J. Weiss.
Filed notice of appeal as of Dr. George Krupp.
Filed notice of appeal as of Maximilian Goldstein.
Filed notice of appeal as of Martin Gross.
Notices sent to Judge Patterson.

3/12/38 Filed bond pending appeal of Dr. George Krupp $1500. National Surety Corporation.

3/15/38 Filed order extending time to file bill of exceptions to and including October 1st, 1938, as to Joseph J. Weiss, Martin Gross, Maximilian Goldstein and George Krupp. Patterson, J.

[fols. 40-64]

5/17/38 Martin Gross bail reduced to $7500 on motion of Mr. Kaufman, Assistant U. S. Attorney. Clancy, J.

8/29/38 Filed recognizance $2000 U. S. F. & G. Co. filed July 18, 1938 for A. L. Weiss.
Bond pending bail $7500 National Surety Co. Filed July 18, 1938 for Martin Gross.

[fols. 65-111] In United States District Court, Southern District of New York

C 100-451

United States of America

v.

Joseph J. Weiss, Alfred L. Weiss, Martin Gross, Dr. Hirsch L. Messman, Dr. Maximilian Goldstein, Dr. George Krupp, Benjamin Nelson, Herman Berger and Morris Spitz, Defendants

Bill of Exceptions

Before: Hon. Robert P. Patterson, District Judge and a Jury.

New York, January 6th, 1938, 10:30 A. M.

Appearances:

Lamar Hardy, Esq., United States Attorney, for the Government; Lamar Hardy, Esq., United States Attorney, John F. Dailey, Jr., Esq., Assistant United States Attorney, Irving R. Kaufman, Esq., Assistant United States Attorney, Robert L. Werner, Esq., Special Assistant to United States Attorney, of Counsel.

Lloyd Paul Stryker, Esq., Attorney for Defendants Joseph J. Weiss and Alfred L. Weiss.

Arthur Schwartz, Esq., Attorney for Defendant Dr. Maximilian Goldstein; Theodore Kiendl, Esq., Edward C. McLean, Esq., and John Polk, Esq., of Counsel.

Jacob W. Friedman, Esq., Attorney for Defendant Martin Gross.

Abraham Males, Esq., Attorney for Defendant Dr. George Krupp; Sylvan Schwartz, Esq., of Counsel.

[fols. 112-214] Benjamin Nelson, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Kaufman:

I have been indicted with the eight other defendants and have pleaded guilty.

[fol. 215] Mr. Kaufman: I ask that this be marked for identification.

(Marked Government's Exhibit 110 for identification.)

Q. Mr. Nelson, I show you Government's Exhibit 110 for identification and I ask you whether the date appearing on the top would refresh your recollection as to approximately the date when you had that discussion about the check with Mr. Weiss. Will you please read that?

A. Yes, sir I remember this conversation. That that date I believe I was waiting for the check to come in Mr. Weiss' office——

Mr. Stryker: Pardon me. May we have the time fixed?

The Witness: It is March 11th, 1937.

A. (Continued.) And I was in Mr. Weiss' office quite late and the check did not come in. When I got hime Mrs. Nelson told me that Dr. Messman's office had called that I should call him back; and I called Dr. Messman's office, and this conversation took place between Mrs. Messman and myself.

Q. Mr. Nelson, do your initials appear on the bottom of Government's Exhibit 110 for Identification?

A. Yes, sir.

Q. And on the second sheet of Exhibit 110?

A. Yes, sir.

Q. Did you hear, Mr. Nelson, a conversation on that record between you and Mrs. Messman played to you?

A. I did——

Mr. Stryker: I object on the ground it is incompetent, Irrelevant and immaterial and upon the further ground that it is an effort to bolster this witness by a memorandum not in evidence. Upon the additional ground that the offer now made to elicit this testimony is in violation of the Fourth and Fifth Amendments of the Constitution of the United States, and upon the further ground that before any record could be admissible we should have the right to cross-[fol. 216] examine the person making the record. On the further ground that there is no evidence which would justify the introduction of this proof. The only analogy to it that I know of would be the memorandum rule, and in order to introduce a memorandum in evidence the witness must first testify that he has no recollection whatever of the transaction on the memorandum.

Now this witness has already said that he remembers having a conversation. I object on the further ground that the evidence sought to be elicited by this question is in violation of Section 605 of the Federal Communications act as construed by the Nardone case recently decided by the Supreme Court of the United States, in which case I submit the effects and rationale of the decision of the Supreme Court was to sustain the minority view on this subject, as expressed in the Olmstead case, in which case the minority speaking through Mr. Justice Holmes described this type of evidence as "dirty business".

Furthermore I object to the attempted introduction of this evidence, that without the opportunity to cross-examine the persons making or alleged to have made this record to determine whether or not there was a trespass and an invasion of the defendant's house or his property, and that under no circumstances in such event would the evidence be admissible, and I call your Honor's attention to the fact that in the Olmstead case the Court particularly commented upon the fact that there was no proof that the record there introduced has been made by means of trespass on the defendant's property. I would say from a reading of that case that that was perhaps the essential point in the case.

The Court: What is the question?

Mr. Stryker: I object finally upon this ground, your Honor: That under section 1423 of subdivision 6 of the Penal Law of the State of New York the tapping of a telephone wire is a felony; and I submit that I must have the opportunity in this case to determine who committed any felonies in this case, because as I have made plain in my opening, it is my definite theory that this witness, throughout this case, has been committing perjury, and, I think [fol. 217] suborned perjury——

Mr, Kaufman: Oh, now, please——

The Court: What has that to do with this objection?

Mr. Kaufman: That is what I would like to know.

Mr. Stryker: Because I have a right to determine who was concerned in any conspiracy to violate any penal statute —a part of which conspiracy I submit this case is. Those are the grounds of my objection.

The Court: Now, read the question.

(Question read as follows):

"Did you hear, Mr. Nelson, a conversation on a record between you and Mrs. Messman played to you?"

The Court: Objection overruled.

Mr. Stryker: Exception.

Q. Did you?

A. I did.

Q. And when you were listening to that record, were you following the conversation with a transcript before you?

A. I did.

Q. And if there was any correction to be made, did you make such correction?

A. I did.

Q. And upon the completion of your listening to that record of your conversation, did you initial that transcript?

A. I did.

Q. And the record also?

A. Yes, sir.

Q. And the initials appearing on the bottom of this transcript indicate that this was a true and accurate transcription of your conversation with Mrs. Messman?

A. Yes, sir.

Q. Did you recognize the voice of Mrs. Messman?

A. I did.

Q. And do you remember whether that telephone call was made from a point within the City of New York, to Dr. Messman's office?

A. This call was made from my house to Dr. Messman's office.

Q. What was Dr. Messman's telephone number? Was it Schuyler 4-2277?

[fol. 218] A. Yes, sir.

Q. And what was your telephone number?

A. Tremont 8-8668.

Mr. Kaufman: At this time I would like to offer in evidence the transcript of that conversation.

The Court: Can you tell us from your memory alone exactly what you said on the telephone to Mrs. Messman in the course of that talk, without looking at any paper? Can you tell us the very words that you used and the very words that she used?

The Witness: I could possibly do it in some way——

Mr. Kaufman: No.

The Court: I say, could you tell us the very precise words that you spoke and that Mrs. Messman, Spoke, word for word, without looking at any paper, and purely from your memory?

The Witness: I couldn't possibly say it word for word, but I could give the substance of the conversation.

The Court: All right. You could give the substance of the conversation, but you could not give the thing word for word?

The Witness: No, your Honor.

The Court: Of course he could not. By refreshing your memory from a paper, could you say whether or not those words are the very words that you used——

The Witness: Yes, sir, your Honor.

The Court: And the very words that she used?

The Witness: Yes, your Honor.

The Court: There is not evidence here that any wires were tapped. I do not know how this paper came into existence.

Mr. Stryker: I do not yet myself, of course. I do not yet myself, of course.

The Court: I have read that Nardone case, and have discussed it with counsel. Even if there were proof in this [fol. 219] case that wires were tapped. I have the opinion that Section 605 of the Federal Communications act, as construed by the Supreme Court in the Nardone case, touches only interstate communication, and does not touch the case of a telephone wire tapped in calls that are strictly within the State.

Mr. Stryker: Just so that my position may be clear on the record——

The Court: However, I think we are getting ahead of ourselves, because there is no proof here as to how either the record was made or how the transcript that has been mentioned came into existence.

Mr. Stryker: That is true, and I may be slightly premature; but I would like to state my position with reference to this case, I submit that——

The Court: I think I understood your attitude a few minutes ago, when you stated your position, and mentioned that case as one of the grounds of your objection.

Mr. Stryker: Perhaps I did make it plain, but one thing I think I did not make clear.

The Court: Of course, it was perfectly admissible evidence prior to the passage of that statute in 1934.

Mr. Stryker: Yes, in a federal court, but I want to have before the court——

Mr. Kaufman: May I suggest, before Mr. Stryker proceeds, that if there is going to be protracted argument, the jury should be excused.

Mr. Stryker: No, I only want to make sure that I have stated my grounds fully; and one thing which I think I did not say is that it is my judgment, and I respectfully submit it to the court, that the Supreme Court of the United States decided unquestionably both in the Olmstead case and in the Nardone case that congress had the power to determine by statute what evidence was admissible and what evidence was not admissible in its federal courts, irrespective of its interstate constitutional powers.

The Court: I will not take issue with you on that.

Mr. Stryker: And that the Court, through Judge Roberts, [fol. 220] decided that evidence gained in that way was not admissible in the federal courts, as he construed the second paragraph, I think of section 605 of the Communications Act. I do not wish to argue it further now, but I just want that on record. But apart from that, and going back now to the common law principles of evidence, I understand the rule to be that an independent memorandum is only admissible in the event that a witness has no independent recollection whatever of the fact. In other words, if this witness, for example, were shown a paper or perhaps a statement by him, and he were asked whether he remember that, and he said "No", that he had no independent recollection whatever of the facts or the substance of it, in such a case the memorandum would be admissible; but in your Honor's questions you asked him whether he could state verbatim what was in it. Now, I respectfully submit to the court that the rule is not whether he can state verbatim, but whether he knows the substance of the conversation; and if I have heard aright, this witness has said that he does know the substance of it; and if that is so, then under the common law principle of evidence, I submit that the memorandum itself is not, in and of itself, admissible.

Mr. Kaufman: May I state further for the record, Your Honor, that——

Mr. Stryker: Just one thing more; I forgot to state, and I want to call the Court's attention to the fact that this witness not only has testified that he knew the substance of the conversation, but that his knowledge of it was so perfect that he could sit there with a pencil and correct the exact words of this transcript.

Mr. Kaufman: Oh, no, that is not what he testified to.

Mr. Stryker: Well, that is as I understood it.

Mr. Kaufman: No. He testified that there was a record made, and that he had a copy of the transcript before him, and that if the transcript was not correct, according to the record, he made his corrections of the transcript; but that the record, in the last analysis, was a true and accurate recording.

Mr. Stryker: I may be in error about that.

[fol. 221] The Court: Do you intend to introduce the record?

Mr. Kaufman: Not for this particular conversation, your Honor, no.

The Court: There may be something to your point on the admissibility of it on common law grounds.

Mr. Stryker: I think there is.

The Court: In view of the fact that the witness has said he could give the substance of it. However, it seems to me that it would be analogous to this: Suppose a witness said, as to an amount, "I think it was about $30," and then by showing him a piece of paper, he could say definitely that it was $30.19; I should think the piece of paper would be all right.

Mr. Stryker: It would be to refresh his recollection, but not the paper itself. As I understand the principle of evidence, a witness may refresh his recollection from anything. I think some cases have said he may refresh his recollection from a newspaper—if you like.

The Court: Oh, yes.

Mr. Stryker: Or a load of hay, or anything at all. But that does not make the newspaper or the load of hay or a signpost admissible.

Mr. Kaufman: Your Honor will recall that I had shown the witness this transcript, and after I had shown him this transcript, he was able to remember the substance of the conversation; but he had no independent recollection of this conversation with Mrs. Messman before I had shown him the transcript.

The Court: I think the point is a fair one—that he may give his recollection of the conversation, with his memory refreshed by that paper, but that does not make the paper in and of itself an independent piece of evidence.

Mr. Kaufman: May I question the witness further on that?

The Court: Yes.

Q. Mr. Nelson, you testified that you had a conversation with Mrs. Messman on or about March 11; is that correct?

A. Yes, sir.

Q. And you further testified that you would not remem-[fol. 222] ber verbatim your conversation with Mrs. Messman, and by "verbatim" I mean word for word.

A. I wouldn't.

Q. Now, subsequently and in this building there was played to you a record which contained your voice and Mrs. Messman's voice; is that so?

A. Yes, sir.

Mr. Stryker: If your Honor please, it seems to me that this is just another way of trying to introduce evidence that is not admissible. The sole question at present, as I understand, is that your Honor is passing now on a purely old fashioned common law principle of evidence. On the other point, I take it——

The Court: I have overruled the other point.

Mr. Stryker: Yes; that was because the conversation does not purport to be with the defendant; but we are now concerned with a simple question of a common law principle or rule of evidence as to whether or not an independent paper is admissible, in the face of testimony that the witness remembers the substance of the conversation.

The Court: Do you want to ask some more preliminary questions?

Mr. Kaufman: Yes.

The Court: All right.

Mr. Kaufman: It is our contention that as corroboration of what the witness has said——.

Mr. Stryker: May I ask that this man be out of the court room while this discussion is going on?

The Court: You mean the witness on the stand?

Mr. Stryker: Yes.

The Court: Oh, no.

Mr. Stryker: Sometimes one listening to argument——

The Court: This discussion will not last much longer on this. I think it has been pretty nearly exhausted.

Mr. Kaufman: It is our contention that this was inde-[fol. 223] pendent corroboration of this witness' statement that Mr. Weiss had told him a check would be forthcoming on a particular date in the sum of $2250——

Mr. Stryker: Again, you see, your Honor——

Mr. Kaufman: I refrained from interrupting Mr. Stryker when he was making his beautiful speech about wiretapping, and I submit that I now have a right to state my——

Mr. Stryker: All right. I will not interrupt you further.

Mr. Kaufman: As I was saying, it is our contention that that is independent corroboration of Mr. Nelson's statement that Mr. Weiss had told him that a check would be forthcoming. You will recall he stated he did not remember the date.

The Court: It is a paper, as a understand it, which the witness said he compared to a phonograph record that was played for him.

Mr. Kaufman: That is right.

The Court: And he said that it is exactly, as I understood him, what he and Mrs. Messman said over the wire.

Mr. Kaufman: Yes.

The Court: Now, he may read that, if you like, with his memory refreshed word for word—he may read it aloud, and that will be his testimony as to what was said when he talked with Mrs. Messman on the telephone; but I do not see how I can take it in independently, until you get before me on the witness stand someone who can identify the phonographic record.

Mr. Kaufman: As a record that was taken on that particular day?

The Court: Yes.

Mr. Kaufman: I will accept your Honor's ruling, and will ask the witness this:

Q. Mr. Nelson, after looking at Government's Exhibit No. 110 for identification, can you tell us word for word what you said to Mrs. Messman on that day (handing)?

[fol. 224] Mr. Stryker: If your Honor please, prior to the answer to that question, may I have a brief preliminary cross examination on that subject of this witness?

The Court: As to how his memory is refreshed?

Mr. Stryker: Yes, and whether it needs to be refreshed.

The Court: Yes.

Preliminary Cross Examination.

By Mr. Stryker:

The Court: That is on the voir dire pure and simple?

Mr. Stryker: Yes, your Honor; simply with respect to the question just asked.

The Court: All right.

Q. You remember, do you, Mr. Nelson, this conversation that you had with Mrs. Messman?

A. I remember it after listening to the phonograph record, and after I have read Government's Exhibit.

Q. Did you remember the conversation before you heard that record?

A. I did not.

Q. You remembered that you had a conversation?

A. I remembered I had many conversations with the office of Dr. Messman or Mrs. Messman.

Q. Well, you remember, do you not, the substance of all these conversations to which you have been testifying now for some days?

Mr. Kaufman: That is objected to. He has not testified at all about the substance of any telephone conversation with Mrs. Messman.

Mr. Stryker: That was not my question. I will withdraw it.

Q. You have been testifying here for several days about conversations that you say you had with Mr. Weiss?

A. Yes.

Q. And with Mr. Gross and others?

A. Yes.

Q. Now, you remember those conversations, do you?

A. In a way.

Q. I mean what you have sworn to under oath as having been said by Mr. Weiss and the others, you remembered that yourself before you got down to the district attorney's [fol. 225] office, did you not?

A. I haven't remembered all the conversations.

Q. Well, did you remember those that you have testified to here today?

Mr. Kaufman: I object to this, your Honor.

The Court: Yes, I think you had better confine it to this particular talk.

Mr. Stryker: All right.

The Court: This is all preliminary.

Mr. Stryker: Yes, I will adopt your Honor's suggestion.

Q. You remember that you had a talk with Mrs. Messman on this day, do you?

A. On the day when I was in Mr. Weiss' office waiting?

Q. On the day——

A. Waiting for the Maccabees check, and when I got home——

Q. No. My question is do you remember having a conversation with Mrs. Messman on the telephone on the day indicated in that memorandum?

A. Yes, sir.

Q. All right. Now, do you remember the substance of that conversation?

A. I do now.

The Court: In a general way?

The Witness: Yes.

Mr. Stryker: Yes, in a general way.

Q. Do you remember the subject matter of that talk?

A. Yes.

Q. That is, what you talked about—you remember that?

A. Yes, sir.

Q. That is, you remember what she talked about and what you talked about?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. You have a clear recollection of that, have you not?

A. Fairly clear. Yes.

Q. And you had, did you, a recollection of what you talked about before you ever got down to the district attorney's office, and spent the time that you have told us you spent there?

Mr. Kaufman: I object to that, your Honor.

The Court: Overruled.

[fol. 226] Q. Did you?

A. Did I remember what?

Q. I say, you had a recollection——

The Court: He means that all along you had a general recollection of what you talked about with Mrs. Messman, ever since you had that talk.

Mr. Stryker: Yes.

Q. The Judge's question is clear to you, is it?

A. Yes; that I remember.

Q. So you had that memory right along before you went into the district attorney's office and after?

A. Not until my memory was refreshed, no.

Q. No. Listen. I am not talking about the exact words or the questions and answers as written out there; but you remembered the substance of what you talked about and what she talked about long before the days when you began to spend your time in the district attorney's office?

A. Mr. Stryker, I had so many conversations during that period of several years, that if I committed myself to tell you that I now remember this conversation between me and Mrs. Messman, I don't believe I would be telling the truth about it.

Q. Well, do you remember, or did you remember at all times the substance of that talk?

A. Yes.

Q. That is, the subject matter that you talked about?

A. Yes.

Q. And you remembered that before you ever saw that paper, did you not?

A. I did.

Q. All right. Now, what was the date of that conversation, Mr. Nelson?

A. According to this record here, it is dated March 11th.

Q. Of what year?

A. 1937.

Q. Now, that conversation was long after the many other conversations that you have testified that you had with the Weisses, was it not?

A. Yes, sir.

Q. All right. Now, you can tell us now, can you not, without looking at that paper at all, the subject that you talked about, and in general way without the exact words at all what Mrs. Messman said to you and what you said to her? You can do that, can you not?

[fol. 227] Mr. Kaufman: If your Honor, please——

The Court: He has said he could, in a general way.

Mr. Stryker: Yes, that is all.

Direct Examination (Resumed).

By Mr. Kaufman:

Q. I now ask you to look at Government's Exhibit 110 for identification, Mr. Nelson, and refreshing your recol-

lection from that, tell us exactly what you said to Mrs. Messman and what Mrs. Messman said to you?

Mr. Stryker: I object. The question is improper until the witness states that he can not give the substance without refreshing his recollection from the paper.

The Court: He said he could give the substance, but he could not give the precise language; but he says that by looking at the paper he can give the precise language; and the precise language, if he can give it, is better than the substance. I will take it. Objection overruled.

Mr. Stryker: Exception.

Q. I want the precise language of your conversation with Mrs. Messman. I want to know what you said to her and what she said to you. Read it to the jury.

The Court: Yes, read it aloud.

Mr. Stryker: He might as well introduce the paper, as to do that. My understanding is—and your Honor will correct me if I am wrong—that the witness can pick up a paper and refresh his recollection, and then testify; and if he can not refresh his recollection at all, the paper itself is evidence; but to sit there and read that paper I submit is just the same as putting it in.

The Court: Read the paper. You may read it aloud.

Mr. Stryker: Exception.

Mr. Kaufman then asked the witness to read from the paper. He read as follows:

"Mrs. Messman: Dr. Messman's office."

"Benjamin Nelson: Hello, Mrs. Messman how are you?"

[fol. 228] "Mrs. Messman: Fine; how are you, Mr. Nelson?

"Benjamin Nelson: All right, thanks."

"Mrs. Messman: Listen, you're going to meet the doctor somewhere?

"Benjamin Nelson: Is the doctor home now?

"Mrs. Messman: Yeah.

"Benjamin Nelson: Can I speak to him, please?

"Mrs. Messman: Well, just a minute, please.

"Benjamin Nelson: Yeah.

"Mrs. Messman: He's listen, he's supposed to meet you somewhere——

"Benjamin Nelson: Yeah, well I'll make up where.

"Mrs. Messman: By, by Merchin?

The Witness: Yes. (Continuing reading):

"Benjamin Nelson: What time?

"Mrs. Messman: He'll start out in a half hour.

"Benjamin Nelson: He'll start in half an hour?

"Mrs. Messman: Yeah, in about three quarters of an hour meet him; He's eating now.

"Benjamin Nelson: uhhuh—he, he's eating now?

"Mrs. Messman: Yeah.

"Benjamin Nelson: I see. Ask him what he's got, what kind of a check he got for me?

"Mrs. Messman: Huh?

Mr. Stryker: Is that "huh" or what is it?

The Court: Do you wish to have it repeated?

Mr. Stryker: Yes.

The Court: Start over again with "huh."

The Witness: All right.

Mr. Kaufman: If you are attempting to humiliate the witness——

Mr. Stryker: Oh, No. I couldn't humiliate this witness. [fols. 229-269] Mr. Kaufman: I object to that, your Honor.

The Court: Go ahead.

The Witness: (Continuing reading)

"Mrs. Messman: Huh?

"Benjamin Nelson: He said, he called up, he's got a check for me, what kind of a check is it?

"Mrs. Messman: A very, very big one.

"Benjamin Nelson: What, $2200?

"Mrs. Messman: Yeah.

"Benjamin Nelson: Oh, then it must have come in after I left the office.

"Mrs. Messman: Yeah, yeah.

"Benjamin Nelson: Oh.

"Mrs. Messman: So wait for him, meet him there.

"Benjamin Nelson: All right.

"Mrs. Messman: In about three quarters——

"Benjamin Nelson: Yeah.

"Mrs. Messman: So long.

"Benjamin Nelson: Listen, hello——

"Mrs. Messman: Hello.

"Benjamin Nelson: Hello—tell him not to say nothing in Merchin's about it.

"Mrs. Messman: O. K.

"Benjamin Nelson: All right.

"Mrs. Messman: Yeah."

[fol. 270] Mr. Kaufman: Your Honor, at this point I am going to renew my offer of these records and conversations.

The Court: What do you mean records?

Mr. Kaufman: Recordings of conversations which Nelson had with other parties.

The Court: You never offered them before. It is not a renewed offer.

Mr. Kaufman: I offered a record yesterday, and I believe Mr. Stryker objected to——

The Court: No offer was made to offer a record. You made an offer of a transcript.

Mr. Kaufman: That is right, your Honor.

The Court: And that was read by the witness.

Mr. Kaufman: Well, at this point, Judge, I would like to offer in evidence not only a transcript but a record, a recording of a conversation which this witness had with a defendant in this case.

The Court: Speaking of a phonograph record?

Mr. Kaufman: A phono-graphic record.

The Court: Is that the same talk?

Mr. Kaufman: It is another talk. This is a talk which the witness had on or about January 9th, 1937. It is a talk he had with Dr. Messman.

Mr. Stryker: Have you finished your offer, Mr. Kaufman?

Mr. Kaufman: Yes, sir.

Mr. Stryker: I object to it, your Honor upon the ground stated by me yesterday, and upon the further ground, that in no event, no matter how your Honor may rule with respect to the communications act or the Nardone case, would any record be admissible, except through the testimony of the person who made it. I can not cross-Examine a physical disc.

The Court: I will make my position clear on an offer of [fol. 271] this sort; a phonograph record of a telephone conversation if properly identified between this witness and Messman, taken on a local call and not on an interstate call, is perfectly admissible, in my opinion. It has been declared in the Supreme Court to be competent evidence over objection that was taken. The recent decision in the Nardone case only applies to interstate calls. That is based upon a provision of the Federal Communications Act. That Act has specially to do only with interstate or foreign communications. The statute in no way reads to the effect that intercepted communication shall not be received in evidence in

a United States Court. Congress has not decided that. Moreover the tender made by Mr. Kaufman here is not a conversation, as I understand it, participated in by any defendant now on trial.

Mr. Stryker: I don't know whom it is with.

The Court: You would have the question raised in the Nardone case if the United States had offered an intercepted communication by a defendant now on trial, or someone else, and also if it were an interstate call. I think the only point involved in the offer here is one of identity. That is the only point I can see.

Mr. Stryker: May I understand the point?

The Court: In pursuance to the old case that was in the Supreme Court some years ago, it is perfectly commonplace in this court to take evidence of communications by telephone obtained by wire. I myself in many cases know that such testimony has been received. The only new feature was the decision furnished by the decision of the Supreme Court last month, and as I explained to you, and as I read the decisions the decisions construe it only applies to interstate communications and only communications where one of the defendants on trial is said to have participated in.

Mr. Stryker: I appreciate Your Honor's ruling.

The Court: Invariably the evidence is introduced by putting a man on the witness stand who took the record and ran the machine, or whatever it is.

Mr. Stryker: That is it, your Honor.

[fol. 272] The Court: That is true. That is the only thing that I am at all in doubt about with respect to the tender of proof which Mr. Kaufman said he is about to make.

Mr. Stryker: I have your Honor's ruling with respect to the construction of the Nardone case and I shall not pursue that further.

The Court: Well, save your exception.

Mr. Stryker: I except of course, your Honor, I shall not pursue that argument. I have tried to make myself clear, and that is the end of that. Certainly I am sure your Honor will agree with me that no mechanical device of this kind is admissible unless on the testimony of the man who said he took it.

The Court: It must be identified some way.

Mr. Kaufman: I disagree with Mr. Stryker's analogy. This situation is a situation where for example we were on a sound truck and Mr. Nelson and Mr. Weiss was walking

down the street and wer were taking a picture of him and the sound voice was recorded, what they were saying. Does Mr. Stryker mean to contend that we play the picture and sound played back with it? The witness could not say that is what happened that day, but that is me walking down the street, and that is what I said and what he said.

Mr. Stryker: I can not follow the analogy. Therefore, I won't try to debate that.

The Court: It is now the noon hour. I will excuse the jury until 2 o'Clock. We will continue this for a few moments after the jury leaves.

(At this point the jury retired from the court room and the proceedings continued as follows in the absence of the jury):

Mr. Stryker: May we have the witness off the stand, your Honor?

The Court: Yes (to the Witness) You come back at 2 o'Clock. (The witness, Mr. Nelson, left the court room.)

The Court: What is the procedure to be?

[fol. 273] Mr. Kaufman: I will show the witness a record.

The Court: Show it to him—you mean a disc?

Mr. Kaufman: Yes, your Honor. On that disc appears the initial and the date next to it. That indicates that he heard this record played back to him on that date. Also on a transcript appear his initials and a date. The transcript is a transcript of the record. The witness will so testify. The witness will further testify that the voice he hears he can identify, the conversations is his, he had it on the telephone on a particular date, and what is recorded on the record is exactly what he said, and what the other party said on that particular date.

As I said before, analagous to this situation is that we will take a moving picture. Now a moving picture is a reflection of a light wave. This is a reflection of sound. It is a recording of sound by a needle. Surely Mr. Stryker could not contend that if I brought in that moving picture in this court room, it was taken last December, and this witness says, "Yes, that is my picture; I remember that. I remember I was doing that when that picture was taken" would not be admissible?

The Court: Do you know whether he was unconscious of the fact the picture was being taken?

Mr. Kaufman: Yes, your Honor.

The Court: You may be right about that. I am not saying I agree with you.

Mr. Stryker: If your Honor please, I am glad you dismissed the jury, because I can talk freely. I am talking to none other than the court. Now let me make myself perfectly plain about this. Here are these discs, they were made by somebody at some time. Now just as in moving pictures and even a person who acts the moving pictures or witnesses them, I think that we all know how moving pictures can be faked and put together, and we have all kinds of scenes of what took place in a pond in Hollywood, and to me, I think [fol. 274] I have seen a wonderful story from which I get a thrill.

Now with regard to these discs I assume that modern science is quite competent to apply various tricks with records in the same way it does with moving pictures, and I want to say to your Honor what I would not have felt privileged to say in the presence of the jury that frankly it is my opinion and my definite conviction that we are dealing here with a witness who would say anything.

Mr. Kaufman: This is the best evidence——

Mr. Stryker: Yes, that is right, but please let me finish.

Mr. Kaufman: I am sorry.

Mr. Stryker: Now that is the type of gentlemen we have here. For five days I have listened to his story which, if true, makes him one of the most abondoned rascals we have ever seen, a man now living far more luxuriously than I did for many years after I came to New York.

The Court: Pass that.

Mr. Stryker: I will let that pass.

Here is a record. Here is something on a disc like a phonograph record. Now I want to know who made that; I want to know how it was made. I want to know whether or not this is an honest record and the only way I can find out, the only way, and I have a right to protect my client's rights, and that is to have the privilege of cross-examining the particular human being that had to do with that.

Now, to play on this machine and have this witness Nelson say "Yes" Yes, "Sure, that is right" is just about as good as someone taking a moving picture [redacted] running it back and asking a witness, "did it happen that way?" "Yes, sir, it happened that way," and so you have a witness' evidence that is not admissible at all. In view of your Honor's ruling on the Nardone Case——

The Court: I suppose generally where intercepted telephone talks have been put in evidence, it is quite frequently [fol. 275] to corroborate a witness who has already testified, and that is your purpose here?

Mr. Kaufman: That is right, your Honor.

The Court: About a telephone talk, of course you can not do it as accureately as you think the record will. Of course where you call a man who has tapped the wires and has played the record, you have not only an identity that is an identification of the record, but you have also independent corroboration of another witness. Whether this introduction by the testimony of the man who makes the record is not necessary or not, is something I have never considered. It is certainly the most natural way of putting the record in, and also furnishes what I suppose the man who introduces it wants it, to furnish corroboration of someone else. Thereafter they had the record, and if they want to attack the phonograph record they have to tear down the credibility of the witness who said he supervised the making of it, and it won't suffice just to attack the credibility of a man who is in the position of Nelson, who is testifying now.

Mr. Kaufman: I want to say here, in order to clear up any smoke screen Mr. Stryker has thrown about it, that everything done here, that every record taken as was taken under the supervision of the recorder, and we aren't running away from anything at all. I know what Mr. Stryker is attempting to do. I know it only too well. If your Honor rules we must lay a foundation, and we are of the opinion we don't have to, we will do it most assuredly; we will do it, we have nothing to fear at all. It is our position we don't have to do it, and even with the ruling we don't have to do it. We will lay that foundation later on.

The Court: You know your own strategy better than anyone else, I do not know what the facts of the case are except what I have heard, and what they are going to develop. Do as you think best. If you press, your tender I will rule on it, and Mr. Stryker, if he objects, the Court will pass on it. We will take a recess now until two o'clock.

Note: The following colloquy occurred before the jury [fol. 276] entered the box.

The Court: Do you want to add something, Mr. Stryker?

Mr. Stryker: Well, no; not now. There is one point that I wanted to make, but it is really not germane to this particular offer. I only wanted to have it in your Honor's mind.

I do not think that this proposition is really germane, now, but I would like to state it, so that I will not forget it—and that is this; that certainly with respect to any alleged records concerning my own clients—if any such there are—but which are not offered at this moment, I understand—I wish to add another reason, that in my judgment I have the right and the duty to cross examine the maker of the record to determine whether or not the same was made as a result of physical invasion of the defendant's close, his house or his office or his place.

The Court: You mean c-l-o-s-e?

Mr. Stryker: That is what I mean. As I mentioned yesterday, but perhaps did not make it very clear, in the Olmstead case, if I may add just a sentence, and then you will have my point of view——

Mr. Kaufman: While we are on that point, I think perhaps we can save time, and I can say that there was no physical invasion. They were simply telephone talks.

Mr. Stryker: But you are not the witness.

Mr. Kaufman: I thought perhaps you would want a concession?

Mr. Stryker: No, I would like to have a witness. Now, in the Court in that Olmstead case, and there was a majority there of five to four, and of course, personally I agree with Mr. Justice Holmes—but that does not make much difference——

The Court: It is just as good as a nine to nothing decision.

Mr. Stryker: Oh, absolutely, and what I think about it does not help a bit, but let us see what it says here in that Olmstead case, in the opinion of Chief Justice Taft: "There [fol. 277] was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants."

Then, he goes on:

"A reasonable view is that one who installs in his house a telephone instrument, with connecting wires, intends to project his voice to those outside with the wires beyond the house, and messages while passing over them are not within the protection of the Fourth Amendment."

The Court I think I catch your point. You mean that if any alleged intercepted telephone communication is offered, wherein it is contended or testified that one of the clients

was one of the talkers on the wire, in such a case you think that your objection to the means of identification that the Government now offers is all the stronger?

Mr. Stryker: That is it.

The Court: Because you want to be satisfied, by cross examining the man who made the record?

Mr. Stryker: That is it.

The Court: That there was no intrusion into one of your client's office or house.

Mr. Stryker: That is precisely my point; just that.

The Court: But that does not bear upon the tender now being made.

Mr. Stryker: No, it does not.

The Court: Because I understand the tender now being made is of an alleged telephone talk between two defendants.

Mr. Stryker: Who have pleaded guilty.

The Court: And who are now not on trial.

Mr. Stryker: That is correct. Your Honor has my point exactly, and that is all.

Mr. Kaufman: Now, on that point, your Honor, I repeat that I think a good deal of time can be saved, and I can [fol. 278] state that the telephones were tapped by the police officers and I again offer to stipulate, if they want me to, the manner in which they were tapped.

The Court: He rejects any such stipulation.

Mr. Stryker: I do not care for it.

Mr. Kaufman: In other words, you reject it?

Mr. Stryker: I do.

Mr. Kaufman: All right.

The Court: Well, unless someone wants to add something to this discussion which took place before the recess——

Mr. Stryker: That is all I have, sir.

Mr. Kiendl: May I add, Your Honor, to the objections that Mr. Stryker has already stated, the objections of the defendant whom I represent, Dr. Goldstein, that there is no proper foundation laid for the admission in evidence of this particular record, and that, in effect, it deprives this defendant of the right of confronation and cross examination.

Mr. Stryker: Your Honor also has in mind, no doubt, the added point which I think I made sufficiently clear yesterday, of the common law rule of evidence about the use of a memorandum—the analogy, in other words, that the

memorandum is not admissible unless the witness says he does not recall the transaction at all. Otherwise the memorandum may be looked at by the witness to refresh his recollection, if he had no memory of it whatever, but can swear that he made it. Then I understand the rule to be that the memorandum becomes independent evidence; and it is because this offer does not meet that rule that I add that ground of objection; and of course I join in what Mr. Kiendl said for my own clients.

The Court: I think I made it clear before the recess that the question on the tender now before me was with respect to the laying of a proper foundation. In other respects I am of opinion that the evidence offered is altogether competent. I think the foundation tendered by Mr. Kaufman suffices, if the witness now on the witness stand can testify from a hearing of the record played, that he recognized [fol. 279] the voices, and that he recalls from the record the precise conversation that took place.

Mr. Stryker: And to that I respectfully take exception; and I take it that your honor is not ruling yet;

The Court: I have already stated that the usual or customary way of introducing evidence of this sort is the other way.

Mr. Stryker: I think so myself.

The Court: And generally that is because they have as a witness neither party to the conversation; and perhaps another reason is that the calling as a witness of a man who made the intereception, and who actually did the recording, either by stenographic notes or by a record of some sort, is offered as corroboration—the evidence, in other words, of another witness making the testimony to go before the jury stand upon the credibility of two people and not of one. I have no doubt that that may be stronger proof than the method that Mr. Kaufman says he intends to pursue, but I do not think that means that the method he does intend to peruse is improper or insufficient, although perhaps not as strong.

Mr. Friedman: May we take it that the exceptions inure to the benefit of all defendants, without specifically taking them?

The Court: That is my understanding

Mr. Kiendl: Throughout the trial?

The Court: Throughout the trial, yes.

Mr. Kaufman: I think Mr. Bailey offers a good suggestion; I do not think I will interrupt the trial, throughout the trial, to play each record as we offer it. At one point we will play certain records, and if the defendants want to play them all, they can all be played; but I do not think I will interrupt the trial as I offer each record, to play it, and then offer the next one and play it; but we will offer the record and then offer the transcript, and then read the transcript.

[fol. 280] The Court: And not play the record?

Mr. Kaufman: And not play each and every record at that particular point.

Mr. Stryker: You mean you want to offer them all at once, which you have the machine?

Mr. Kaufman: The records will all be offered, but the playing will take place on a particular day or a particular afternoon.

The Court: All right.

(Whereupon, the jury returned to the box, and the trial proceeded as follows:)

The witness resumed the stand.

(Government's Exhibit 119 bears Dr. Messman's initials and my own on the bottom of each page.)

Government's Exhibit 118, 118a and 118b also bear my initials under date of November 3rd, 1937, and corresponds with the date of Government's Exhibit 119.

I heard Government's Exhibits 118, 118a, and 118b played for me and I identified the voices on those records as Dr. Messman's and my own. (491)

I compared what I heard while I was listening to those records with the transcript, Government's Exhibit 119.

I made corrections on the transcript after I heard the record played over a few times, and when I got all through if the record was correct I then initialed the record and the transcript so that the transcript would then jibe and be an accurate transcription of the record. (492)

Q. And that was what occurred with respect to Government's Exhibits Nos. 118, 118a, 118b and 119 for identification?

A. Yes, sir.

Q. Did Government's Exhibits Nos. 118, 118a, and 118b record, after you looked at Government's Exhibit 119 for

identification, the conversation which you had with Mr. Messman on January 29, 1937?

A. It does.

[fol. 281] Mr. Kaufman: I now offer Government's Exhibits Nos. 118, 118a, 118b and 119 for identification, in evidence.

Mr. Stryker: Well, even under your Honor's ruling I submit that no proper foundation has been laid—the point being that he has not testified that he does not recall the substance of the conversation independently.

Mr. Kaufman: I do not have to ask him that. I am not offering it on that theory. I am offering it on the theory that is independent corroboration.

Mr. Stryker: But you can not have self serving declarations, and the rule of evidence is the memorandum rule.

The Court: I will overrule the objection so far as concerns Exhibits 118, 118a, and 118b, the phonographic records, on the ground that the witness has testified that he recognized the voices and identified the talk.

Now you offer Exhibit 119th at the same time?

Mr. Kaufman: Yes, your Honor.

The Court: The only objection to that, as I understand, is that it would not be the best evidence, being only part of the record.

Mr. Stryker: It is not the best evidence, and also it does not comply with the memorandum rule. The witness not only does not deny that he recalls the substance of it, but his memory is so good that he could correct the mechanical record itself.

The Court: No, that is not it. I understand he testified that he made the typewritten transcript, by corrections, correspond precisely to the phonographic record. That is what he said.

The Court: That is right.

Mr. Stryker: We do not know who did make the transcript.

The Court: That has not been brought out, but it was given to the witness, and he said he heard the records played, and then made such notations of corrections upon the typewritten paper as to make it a facsimile of the phonograph record.

[fol. 282] The only objection that I see to Exhibit No. 119 for identification is that it may not be the best evidence—the phonographic record which the witness says he recognized the voices on, being better evidence.

Mr. Kaufman: Yes, that is right, your Honor. The reason, in addition to everything else, that we are offering these transcripts is so that time may be saved; and if these records are not eventually played, we will lay the proper foundation that they were actually true and accurate transcriptions of the record which was offered in evidence. But if they are played——

The Court: All right, you may mark Exhibit No. 119 in evidence. Objection overruled.

Mr. Stryker: I respectfully except.

(Government's Exhibit 118, 118a, 118b and 119 received in evidence.)

Q. Now, Mr. Nelson, I notice on Government's Exhibit No. 119 in evidence that there appear several Jewish expressions here. Did you read the translation of the Jewish into English appearing immediately under those Jewish expressions?

A. I did.

Q. And were they a proper and accurate translation?

A. It was.

Q. As near as possible?

A. Yes, sir.

The Court: Was this conversation in English or in Yiddish?

The Witness: Part was in English, and certain of the conversations were in Jewish.

Mr. Friedman: If your Honor, Please, I object on the ground that no foundation has been laid to show the witness' qualifications to translate from one language into the other.

The Court: Do you speak both tongues?

The Witness: I do.

The Court: And most of your conversations were in English, but sometimes you used expressions in Yiddish?

The Witness: A few words, from time to time.

The Court: Overruled.

[fol. 283] Mr. Friedman: Exception.

Mr. Kaufman: I would like to read Government's Exhibit No. 119 in evidence at this time.

Mr. Kiendl: May the record show that we are renewing the objections—the additional objections that were made to the records and the transcript?

The Court: Yes, I understand Mr. Stryker's objections embodied everything that had been discussed today.

(Government's Exhibit 119 in evidence dated January 29th, 1937, read to the jury.)

I had this conversation with Dr. Messman. I do not recall where I called from. I was in New York City and called Dr. Messman at Schuyler 4-2277. The Martin referred to is Martin Gross and J. J. is J. J. Weiss. When I said "Downtown" I meant the office of J. J. Weiss and when I used the words "the man higher up," I meant Mr. Weiss.

(Upon objection the jury was instructed to disregard this reference.)

Q. Who was referred to by "the oracle"?

Mr. Stryker: I object to that on the same ground.
The Court: Sustained.

Q. Did you have any understanding with Dr. Messman as to who was mean——

Mr. Stryker: I object to that.
The Court: Sustained. Not any understanding but any conversation.

Q. Yes. Did you have any conversation with Dr. Messman——

The Court: Prior to this talk.

Q. You had or did you have any other conversation with Dr. Messman, where the expressions "baaldvoer" or "Oracle" were used?

Mr. Stryker: I object to that as incompetent, irrelevant and immaterial, and on the same grounds urged before.
The Court: Overruled.
Mr. Stryker: Exception.

[fol. 284] Q. Did you hear the question?
A. Will you repeat it?

Mr. Kaufman: Will you please read the question?

Q. (Read.)
A. I believe we did.

The checks referred to in the conversation were the checks I have previously testified about, namely, the checks I said Dr. Messman told me Gross had given him to pay for Spitz' hospitalization and which came back.

Mr. Kaufman: Your Honor, in order to clarify the record, I would like to offer the corresponding record to Government's Exhibit 110 for identification, which was used to refresh the witness' recollection yesterday; to offer Exhibit No. 110 for identification and the corresponding record into evidence just as Government's Exhibits Nos. 118, 118a, 118b, and 119 went into evidence.

The Court: Is this of the telephone conversation to which the witness testified between him and Mrs. Messman?

Mr. Kauman: That is right.

Mr. Stryker: The one that he read yesterday?

Mr. Kaufman: Yes.

Mr. Stryker: Your Honor, we make the same objection, and I take it I will not have to renew it?

The Court: That is right. Objection overruled.

Mr. Stryker: And the same exception.

The Court: Yes. This was used yesterday only to refresh the witness' recollection, and, therefore, I did not mark it in evidence, but if you want to offer it and the phonographic record with it, with the testimony that he gave yesterday about listening to the phonographic record and comparing it against that, I will take it as simply another form of the phonographic record."

(Government's Exhibit 110 and 110A received in evidence.)

When I said that the checks came back I meant that Gross' checks bounced and were no good on account of the attachment of his account at the bank. (499)

[fol. 285] I followed the same procedure with reference to Government's Exhibits 110 and 110a, that is, I listened and compared them as I did with Government's Exhibits 118, 118a, 118b and 119. (500)

(Marked Government's Exhibits 120 and 120a for identification.)

Mr. Kaufman: I think, your Honor that instead of marking the folders that we would be better off if we marked the phonograph records, because in putting them back in the folders there are several conversations sometimes contained on one record, and I think we would be better off if we marked the fact of the record itself.

The Court: You can put a label on it. If you mark that container you may get it mixed. You can put a label on there or a string and tag.

Mr. Kaufman: The face of this record is now 118b, and the back of this record is now being marked 120 for identifications. So mark that 118b.

(Marked Government's Exhibit 118b.)

Mr. Kaufman: This side is marked 120. With respect to conversations C, 120—Just put C-120.

(Marked Government's Exhibit 120-C.)

Mr. Kaufman: Your Honor, with respect to Government's Exhibits 120 and 120A for the sake of continuity this conversation between Dr. Messman and J. J. Weiss, and we will lay the proper foundation at a later date as to where this call was made from and if Mr. Stryker raises the objection about trespass et cetera, we will also show it is not a trespass.

Mr. Stryker: I didn't hear that.

Mr. Kaufman: It is not a trespass. So subject to connection in that respect we would like to offer this conversation of this witness and identifying voices, and he has heard the record played back to him.

Mr. Stryker: Whom is this between?

Mr. Kaufman: J. J. Weiss and Dr. Messman.

Mr. Stryker: How can this witness help us?

Mr. Kaufman: Just for the sake of continuity.

[fol. 286] The Court: I will sustain the objection.

Mr. Kaufman: He can identify the voices.

The Court: That is all he can show. On his own record, not only recognize the voice but when he hears it played. That is what he said. That is quite different. That is more substantial.

Mr. Kaufman: That is right, your Honor; and at the proper time Dr. Messman will testify to that.

The Court: Offer it at the proper time.

Mr. Stryker: Unless there is some feature other than that I take it I need not object to any part of this line?

The Court: There is nothing.

Mr. Stryker: Transactions between Mr. Messman and Mr. Weiss.

The Court: They are only being marked for identification.

Mr. Stryker? I just don't want to keep on interrupting.

Q. Now, Mr. Nelson with respect to 121 for identification and 120 A for identification did you follow the same procedure as you did with respect to Government's Exhibit 118

and Government's Exhibit 118a and Government's Exhibit 118b and Government's Exhibit 119?

A. Yes, sir.

Mr. Kaufman: I offer them in evidence.

The Court: What do they purport to be? Ask him what they are.

Q. What is Government's Exhibit 129 A, conversation C, and Government's Exhibit 121 for identification?

A. Conversations between Dr. Messman and myself.

Q. Had on the telephone?

A. Yes, sir.

Q. Do you remember where you were when you called Dr. Messman?

Mr. Stryker: Can not we have the dat-?

Q. If the record is that it was January 13th, 1937, would you say that is correct?

A. Yes, sir; that would be the date, and I listened to the phonograph on November 15th, 1937.

Q. And you initialed both the record and the transcript?

[fol. 287] A. Yes, sir.

Q. Do you remember where you were when you made this call?

A. No.

Q. You were in the City of New York?

A. Yes, sir.

Q. And you called Schuyler 4-2277?

A. Yes, sir.

Mr. Stryker: Same objection and exception.

The Court: Yes; same ruling.

(Government's Exhibits 120 and 120 A Marked in evidence.)

Mr. Kaufman: May I read the transcript dated January 13th, 1937, record No. 91-12-C. Incoming, Schuyler 4-2277?

The Court: Yes.

(Mr. Kaufman read the transcript to the jury.)

Government's Exhibits 122, 122a and 122b is a conversation between Mrs. Messman, Dr. Messman and myself on February 1st, 1937. I followed the same procedure with reference to these as I did with reference to Government's Exhibits 118, 118a, 118b, and 119. I do not remember where

I was when I made this telephone call. I was in New York City. I heard this record played and compared it with the [fols. 288-289] typewritten statement on November 3rd, 1937, in the United States Attorney's Office in this building.

(Mr. Kaufman read Government's Exhibit 122 to the jury.)

[fol. 290-295] Government's Exhibits 123 and 124a for identification refreshes my recollection about a telephone call from Dr. Messman on Febraury 7th, 1937. I listened to this record played back to me on November 3th, 1937 and the transcript is a true and accurate one of my conversation I recognized the voices. The same procedure was followed with reference to these records as with the others. (512)

Government's Exhibits 124 and 124a marked in evidence.)

When I had this conversation my telephone number was Tremeon 8-8668.

(Mr. Kaufman read Government's Exhibit 124a to the Jury.)

[fol. 296] On Government's Exhibit 128 the date and initials are November 22nd, 1937, and on Government's Exhibit 128a the date is November 12th, 1937. I heard Government's Exhibit 128a for identification played to me again last night and I compared it with Government's Exhibit 128. I account the difference in dates by the fact that at the time when I listened to this record and I followed the transcript there were several corrections and the corrections were [fol. 297] made in pencil or ink by one of the girls in the room where the exhibits were given to me. I listened to it on November 12th, but sometime later the young lady gave it to me to initial, so I put in the date of the corrections and not the date of the record.

(Government's Exhibit 128a received in evidence, 533.)

I followed the same procedure in the identification of the voices and the correcting of the transcript as I did in Government's Exhibit 118, 118a, 118b and 119. I do not remember where I was when I made the call to Schuyler 4-2277 but I was in New York City.

Mr. Kaufman: At this point, if your Honor please the Government would like to play some records which were introduced into evidence yesterday. We have the recording device ready, we are ready to proceed. However, there is

just one word I would like to say before we proceed, and that is this: that it must be borne in mind these were records which were made of telephone conversations, and if at times it is not perfectly clear any juror who would like to request a replaying of the record to make out the word, the government will be glad to play the record over for them.

The Court: Play it slowly.

Mr. Friedman: May I object on the ground that the records were read yesterday, and that is repetitious testimony.

The Court: Overruled.

Mr. Friedman: Exception.

Mr. Stryker: The general blanket objection covers all this procedure, too?

The Court: Yes, it does.

Mr. Kaufman: For the guidance of the jury, if your Honor please, I would like to give a copy of the transcript to each juror that has offered in evidence.

The Court: And show one to each counsel.

[fol. 298] (Mr. Kaufman hands papers to each of the jurors and each counsel.)

Mr. Stryker: If your Honor please, can we have identified the gentlemen who is now going to operate this machine for us?

Mr. Kaufman: His name is Simpson.

Mr. Stryker: What is his address?

The Court: What is he, an employee of the Department of Justice?

Mr. Kaufman: He is an employee of Mr. John Harley. Mr. Harley is in the sound recording business.

Mr. Stryker: I would like to know who is he and what he is, under oath.

The Court: (Addressing a man in the court room.) Give us his full name, sir.

Mr. Simpson: Hobart R. Simpson.

The Court: Do you want his training or experience?

Mr. Stryker: I assume he knows how to run the machine. I won't waste the time of the Court on that. Who he is, before we start. He is here in some capacity.

The Court: Were you requested to come here by the United States Attorney?

Mr. Simpson: By Mr. Dailey.

The Court: By whom employed?

Mr. Simpson: By Mr. Harley.

Mr. Stryker: Where is their place of business?

Mr. Simpson: 122 East 42nd Street.

Mr. Stryker: And what is the business?

The Court: What is the title of your company?

Mr. Simpson: Detective agency.

Mr. Stryker: May these statements be deemed to have been made under oath?

The Court: They can not be unless he is sworn.

[fols. 299-559] Mr. Stryker: Will you swear him, your Honor.

The Court: Yes, I will do that the same as I would with an interpreter.

Mr. Stryker: Yes, your Honor, I think he should be sworn.

Hobart R. Simpson, was then called as a witness on behalf of the government. The answers I have heretofore given I now state under oath.

Mr. Stryker: May I ask an additional question?

By Mr. Stryker:

Q. Is it a private detective agency and a licensed detective agency?

Mr. Kaufman: It is not a detective agency.

Mr. Stryker: A private detective agency, a licensed detective; is Mr. Harley a licensed detective?

A. Yes.

Benjamin Nelson resumed the stand.

(The following procedure then took place. The jury listened and followed the transcript as a record was played before them. The following exhibits were played aloud on a reproducing machine: Government's Exhibit 110, 121, 121a, 123, 123a, 123b, 125, 125a, 127, 127a and 127b.)

Government's Exhibit 133 and 133a is a conversation between Messman and myself on March 2nd, 1937. I heard it played to me and recognized the voices as Dr. Messman's and my own. I initialed all these exhibits. I do not remember where I was when I called but I was in New York City, and I followed the same procedure, checking the accuracy as I did with the other exhibits. I identified these November

4th. They were played to me by a girl in the United States Attorney's office.

(Government's Exhibits 133 and 133a marked in evidence.)

(Government's Exhibit 133a read to the jury.)

[fol. 560] PHILIP E. MCGLYNN, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Kaufman:

I am a detective in the New York City Police Department. I have been with the New York City Police Department for thirty-five years. For about thirty years I have placed taps on telephone wires for the Police Department (1223). I was assigned to Deputy Chief Inspector Lyons until he became Second Deputy Commissioner. I am assigned to the same office, practically the same office he controlled, and now under Captain Dowd. On or about February 24, 1937, at the request of Post Office Inspector Shea and on the instructions of my superior, I placed a telephone tap on five telephone wires of J. J. & A. L. Weiss at 276 Fifth Avenue, listed as Bogardus 4-4850, 4851, 4852, 4853 and 4854. I ran an extension of these wires to the fourth floor of 1200 Broadway (1224). I labeled those wires and I labeled them for the corresponding telephone wires, in other words, of 4850, 4851, 4852, 4853 and 4854. Inspector Shea was there and I left the wires in his custody and under his control, after testing them (1225). On the 28th day of January, 1937, I placed a telephone tap on Schuyler 4-2277, the telephone of Dr. Hirsch L. Messman of 315 Central Park West, and I ran an extension of that tap to the first floor of 32 West 91st Street where Inspector Shea was and left the wires in his custody and under his control after testing them (1225). I had a partner, also a New York City detective, in placing these taps on those wires, Robert L. Lewis (1226).

Cross-Examination.

By Mr. Stryker:

We went into the cellar of the premises of 276 Fifth Avenue. We tested the wires there on the terminal. We

went in the day time. This building is the old Holland Building. We made a test there, found out that they bridged with the other premises, 1200 Broadway, with that multiple [fol. 561] there. Then went to 1200 Broadway and made a test there and then from 1200 Broadway ran them to the fourth floor into the room that Inspector Shea was in. I never saw the recording ins-rument that recorded the conversations (1226). I left Inspector Shea in charge of the wires with the numbers on. He was there when I made a test of the proper numbers. He never told me about a recording machine and I never asked him. Those are my orders. My orders not to know anything about recording machines, and I don't know anything about it. My testimony is confined solely to the installation of the wires (1227). I don't know whether the Police Department has any recording machine. I cannot talk for them. I can talk only for the main office. They have no recording machines at the main office of the detective department for recording conversations.

Mr. Stryker: Let me see, as a detective with such long experience as yours, I presume you are reasonably familiar with the statutes of the State of New York?

A. I am no lawyer.

Q. No, but you are a detective.

A. That is right.

Wire tapping is not a felony under the laws of the State of New York when used to apprehend a criminal. I know of no provision that permits anyone to commit that felony but you can use any apparatus that a person may use for the purpose of commiting a crime against him for his apprehension. I did not say that the police can commit any crime they wish provided it is with a good motive to detect another crime, but they can use any device that a criminal uses in the commission of a crime against him for the purpose of apprehension. I don't know what the criminals in this case were doing. I was told to do the work by my chief; he told me it was a criminal investigation.

Though the New York Penal Statute, Section 1463, Subdivision 6, makes wire tapping punishable by not more than two years under the laws of New York, it does not apply [fol. 562] in apprehending a criminal in a criminal investigation (1228). I never in my life heard of the Leeds Wireless Company or of a man by the name of Adolph Leopold.

I never heard of a firm by the name of Silver & Bernstein, or that Leopold was in any way related to them. I never met those gentlemen.

We do not go to the owner of the building when we make the tap. We go in as telephone men and do our work. On those cases where we are going to put in a wire for our own use, we have someone from our department to do so, but on this particular occasion requested them to do it themselves. We didn't tell them we were detectives.

Mr. Stryker: You didn't go in as a policeman would do and say frankly to the——

The Court: What has this got to do with it? This man is not on trial. It doesn't matter whether he knows the statutes of New York or not.

I don't know anything about these wires other than the work I did myself (1229). The day I tapped the Schuyler number was January 28, 1937 and the other one (Bogardus number) was February 24, 1937. I was not told by anyone as to whether there were prior taps made on these wires by anyone before the authorities, before the police went in and made them.

Redirect examination.

By Mr. Kaufman:

I did not find any evidence of any previous taps having been placed before I placed mine there. If a first class job was done there would be no evidence left that a tap had been made (1231). I have heard in the course of my experience of a private detective or private persons other than member of the Police Department making wire taps but I never personally came in contact with anyone doing it. [fol. 563] Hobart A. Simpson, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct-examination.

By Mr. Kaufman:

I am 45 years old. I have been educated in the schools of New York City. I am married and live with my family.

For quite sometime, I have had experience with recording apparatus and transmittal apparatus. My experience in this field is that I was with the United States Signal

Corps at Fort Monmouth in the development of apparatus, transmission, receiving. I formed a corporation for the manufacture of receiving apparatus and various parts connected with it. I was employed as superintendent of the Stevenson Laboratories in Plainfield, New Jersey. I then formed another corporation for the manufacture of sound apparatus and then was connected with the Jones Research Laboratories in the same line of work. From there, I went to John S. Harley, with which firm I am employed at this time. I have been employed by John S. Harley, Inc., for a period of approximately five years and I have been continuously employed by them. My connection, or rather work, has been the development and installation of recording apparatus.

On or about March 9th, 1937, I made an installation of recording equipment at 1200 Broadway, New York City. I received my instructions to go to 1200 Broadway from my office. When I arrived at 1200 Broadway, I went to the fourth floor. My instructions from the office were to go to the fourth floor in the rear and that I would find a room with a door open, and that I would find five pairs of telephone wires which I was to connect up to the apparatus.

When I arrived there, Post Office Inspector Shea was at the premises and pointed out the wires to me. I connected up the wires to the recording apparatus under his instructions. After the wires were connected, we tested each line. At that particular time, I did not know that the lines belonged to J. J. & A. L. Weiss. I checked the lines and tested them to see that they were the proper numbers on each line; in other words, the lines were tagged as 50, 51, 52, 53 and [fol. 564] 54. In other words, they were checked to see whether they were actually taps of the wires on Bogardus 4-4850 to 4854.

By Mr. Kaufman:

Q. Just briefly describe how these recording machines operate.

A. Well, I will give you first the dial registers, which record the numbers dialed.

The Court: These gentlemen over here have to hear you. Speak louder.

The Witness: All right sir. The dial registers are used to record the impulses on the telephone line, of all numbers

that are dialed. When a receiver is raised, the dial-register goes into operation; and just for example, if this number "Cortland 7-7100" was dialed, the letter "C" would correspond to "2"—the two dot impulses which would be printed on the tape. And "O" would correspond to "6", with six impulses printed; and "r" would correspond to "7", and when you got to the "7100" you would have the "72 and "1" and for the zeros you would have "10".

On your rings for incoming calls, you have a multiplicity of dots recorded, showing a ring.

Q. And by counting the dots printed upon the tape, when "Bogardus 4-4850" was called, you could tell by the numbers on the dial?

A. Always, yes.

Q. So much for the dial tape. Now, these machines operate on turntables?

A. We had at that particular location a switchboard set up with two recording machines. The lines were brought into the switchboard, and the switchboard was connected with the recording machine, and also connected to the table, on which there were five pairs of head phones for monitory purposes or taking down notes from the line.

The Court: For what kind of purpose?

The Witness: Monitory.

The Court: What is that? A precautionary measure?

The Witness: No, they take down stenographic notes [fol. 565] from the lines. That is for taking down stenographic notes. If a call should come in—perhaps I had better say that the two machines were known as "1200" and "1201".

Q. Were those arbitrary numbers just taken for identifying the records taken on either machine?

A. That is correct. For instance, if an outgoing call was made, the drop would come down, signaling a call going out on that line.

Mr Stryker: A drop?

The Witness: A signal drop. If a call was coming in, we will say, on line "50" which was "4850," the signal drop would come down, and the operator in charge of the switchboard would take a plug of that line and connect it with No. 1200 recording machine, and would plug it in, connected with the machine, with the incoming call, and would call

out "record." Immediately the operator in charge of that machine would touch a button, starting up the recording apparatus.

In that way, the girl would get the full conversation and the girl who listens in on the earphones to that very conversation would also get the conversation and take down in shorthand what was coming over the line. Each machine had two turn tables for two records. The purpose of two turn tables was to insure continuity of conversation. These turn tables would operate in the following manner. For example: If No. 1 turn table was started, and ran approximately five minutes, at the end of that period of time, No. 2, on the right, would automatically start in operation, and at the same time both turn tables would be running, and both records, and at the end of No. 1 table there would be possibly three or four lines recorded, and the same number of lines would be repeated on No. 2 table.

Thus there would always be a continuity of conversation. If the conversation was so long that it ran through a record on number 2 turn table, the operator would put in a new record on turn table No. 1 so that the conversation again beyond No. 2, and back on to No. 1 again.

After the installation of this recording apparatus on March 9th, 1937, I was in complete charge of the machines [fol. 566] and the sound record devices were under my complete supervision.

By Mr. Kaufman:

Q. And who operated the machines and made the recordings?

A. Six girls from our office.

Q. Now, Mr. Simpson, in order to remove any erroneous impression that may have been created here, did the John S. Harley Company have anything to do with this particular case, other than to install recording apparatus and operate the recording machines?

Mr. Stryker: I object to the form of the question as improper.

The Court: Do you know of any other connection that your employer or that you had with this case, other than the installation and supervision of those sound apparatus or machines?

The Witness: That was the only connection that we had with the case.

Mr. Kaufman: Thank you.

Q. Did anyone other than the employees of John S. Harley, Inc., ever operate that recording equipment for the taking of any of the records?

A. No one was allowed to operate the machines but our employees. We had a regular system for identifying and marking all phonographic records. I will try to explain to the court and jury and give as clearly as I can the method that was followed out in certifying the accuracy of these records by taking a typical record, Government's exhibit 151-A in evidence. On this particular record, it showed three different recordings with a space between each one. In this case the first recording would be known as "A" cut" or "A" recording; the second would be known as "B" and the third as "C". Thus, if a conversation was short and did not require the entire record, we would use that same record for several conversations. I would move the needle or handle over so that it could record further conversation if one came in or went out, and the second conversation on the particular face of the record would be "B cut". All the recordings were actually made on discs similar to that which I am now holding in my hand and they were done in [fol. 567] the manner which I described. That is the only type of record or disc that we ever used. There were no wax cylinders or anything of that nature and this is the actual original record and the conversation was recorded on those records in the first instance.

In addition to the notation of the cuts, which I will speak of as "A", immediately the machine was started or a call was received, the time was put down on the record—and in this case it is 4:05—and the line that it came over on—Bogardus "50", which would be "4850" and also the recording machine in this instance was No. 1200. The girl who was operating that machine was on machine No. 1200 and to distinguish the machine, she would put down on her record 1200 to denote her particular machine. The girl who took a record on machine 1201 would put down on that record 1201 if it came over on that line. In this particular instance it was machine 1200 that took the record.

The particular number of this record in this particular case is "580". "580" means that this is the 580th record

that was recorded on machine No. 1200. The initials of the operator in charge of the record, who does the particular recording—the girl—and in this case it was "H. C." and also another initial appears, which was the girl that might be monitoring. The monitor is a girl who listens in and takes stenographic notes at the same time that this particular record is being recorded. There were six things that appeared on the face of these records—and I believe those records are called RCA Victor Home Recording Records. There were six things on those records to certify the accuracy of the record and one was the date on which the record was taken (1237-1240). Secondly, the particular cut or record is recorded as "A, B, C, or D"; fourthly, the time to the nearest minute, when the conversation began; fifthly, the particular line number or trunk line over which the conversation went or came, such as Bogardus 4-4850 or 51 or 52; and sixthly, the number of the record is notated and in this case it is "580".

The Court: Were all these conversations taken down in [fol. 568] two ways; one on the recording machine, and two, by the use of earphones and stenographic notes?

The Witness: Yes, they were.

The Court: Have you seen those typewritten statements that were offered in evidence here last week?

The Witness: No, I don't think I have.

The Court: Could you say whether or not those are the stenographic notes?

The Witness: I could not say? Because I cannot—I do not use shorthand, and I would not be able to read the notes anyhow.

By Mr. Kaufman:

Q. Now, Mr. Simpson, every record labeled either "1200" or "1201" would contain conversations either sent from or received through the trunk lines Bogardus 4-4850 to Bogardus 4-4854, inclusive?

A. That is right.

Q. Now, will you tell us, Mr. Simpson, all of the employees of John S. Harley Company who operated at one time or another these recording machines?

A. I will try to recall them all. You want the full names?

Q. Yes.

A. There was Ida Handman, Marguerite Healey, Helen Capperell, Mrs. E. Morris——

Q. How many have you there?
A. I forgot how many I have given.

The Court: Four.

Q. Did you give us Rose Guttman?
A. No. Rose Guttman.
Q. And Miss E. Owens?
A. Yes, and Miss E. Owens.
Q. So that if one of those girls was operating one of these machines, her initials would appear upon those records?
A. That is correct.
Q. And that was generally the system which was devised to be followed in this particular case?
A. That is right.
Q. Now, aside from your own employees, Mr. Simpson, there were stenographers present taking these conversations, were there?
A. Yes, sir.
[fol. 569] Q. And they sat at a separate table, with earphones?
A. Yes, sir. On these particular phonographic recordings there are two sets of initials, one of which are the initials of the person who recorded it or who worked on the machine and the other set of initials are those of the particular stenographer. Neither I nor my sound operators have anything to do with those stenographers. It is my understanding that those stenographers with whom I had nothing to do were from Mr. Shea's office—that is, Post Office Inspector Shea's office.

I have told you about machine numbers "1200" and "1201" which were the Weiss wires on Bogardus 4-4850 to 4854.

I also had occasion to install a machine at 32 West 91st Street, which was likewise done pursuant to instructions which I had received at my office. I think that I installed a machine there on January 29th, 1937. On arriving there, I met Post Office Inspector Shea. There was just one line there which had a tag on it. We connected the apparatus to the line and tested the line to prove whether it was labeled properly or not. That line had on it telephone number Schuyler 4-2277. That line belonged to Dr. Hirsch L. Messman. The operation of that machine was similar to the operation of the machine which I have just described.

All the operations were the same with the exception that there was no dial recorders or registers used on the 91st Street operation, due to the fact that Dr. Messman's line was a manually operated telephone when numbers were called.

I had the same system of certifying and identifying the records with respect to the records taken at 1200 Broadway with the exception that the records instead of being labeled "1200" or "1201" were labeled at the beginning "H M" for "Hirsch Messman" and "91". There was a further exception that it was not necessary to have the particular line shown such as Bogardus 4-4850 to 4854 because in Dr. Messman's instance there was only one telephone wire.

The means that were taken to certify the accuracy of those recordings, an example of which was the typical record, Gov-
[fol. 570] ernment's Exhibit 133-A in evidence which particular record has three recordings on it and it is marked "A". That record has three cuts, "A, B and C". Those three cuts represent three separate talks, three calls. The time, for example given on A cut is 9:57 A. M. the number "91" appears, which denotes that particular location. "227" is the number of that record. The initial of the operator are "M H". The individual listening in at the time of that conversation, as near as I can read, was one "I M", and the date is "3-2-37".

I was likewise in complete charge of the recording apparatus at those premises. The recording apparatus at "91" was installed a little while before the recording apparatus at 1200 Broadway. When the recording apparatus at 1200 Broadway was installed, I made my rounds between the two places daily.

By Mr. Kaufman:

Q. And would you see that only one of your girls operated the machine at "91" also?

A. That was the only person that we had to operate the machines—or myself in one or two instances.

Q. And would you say that it was one of the girls whom you have mentioned before?

A. That is right.

Q. And were those conversations also taken down stenographically?

A. They were.

Q. By one of these girls that you said Inspector Shea sent down?

A. That is correct. (1246)

Q. Now, at the end of each day were these records picked up by a representative of Inspector Shea, and sent to the office of the United States Attorney?

A. They were.

Q. Where they were filed away, is that correct?

A. That is correct.

Mr. Kaufman: Your witness.

(1241-6)

Cross-examination.

By Mr. Stryker:

[fol. 571] My duties as appears from my direct examination for the past five years has largely been confined to the installation and development of the recording machines. I mean by that designing, manufacturing and developing new apparafus—new ideas to use in the apparatus. I have been working for the Harley Detective Agency for the past five years, where we make the machines. The Harley Detective Agency makes the machines and are the manufacturers of them.

In addition to doing private detective work, we also manufacture all machines for our own apparatus. The recording apparatus that is used in a room to pick up conversation from a tapped wire is approximately what you see there on a bench or table (indicating) on the other side of the room. I mean that machine on the left of Mr. Stryker. The amplifier is the same used in taking the taps and the tables that are used for recording are likewise the same as are over there. The instrument over there is the one which gives us the voices and it is also the same machine that takes in the voices. We have our own place for the manufacture of these machines. It is merely a laboratory for the manufacture of such machines as we need for our own use. We actually construct every part of those machines ourselves.

The Harley Detective Agency is a private detective agency as I said the other day. When I stated on my direct examination that I went up to this office at 1200 Broadway under instructions from the office, the particular person who gave me the instructions was Mr. Harley, John S. Harley. Mr. Harley is in New York. He gave me the instructions on

March 9th, 1937 with respect to 1200 Broadway. With respect to 91st Street, I received my instructions from Mr. Harley on January 29th, 1937. With respect to the apparatus which was installed at 91st Street, it was placed in an apartment in the rear of 32 West 91st Street, which I would call the first floor. That was not the same building in which Dr. Messman lived; it was another building. I did not get in there by stealth, *by* Inspector Shea had rented the apartment under his name as Frank Shea.

By Mr. Stryker:

[fol. 572] Q. Now, you have been working, I gathered, for the past five years in installing these instruments and recording conversations over telephone wires that people thought were private?

Mr. Kaufman: Oh, that is objected to, your Honor.

Mr. Stryker: All right. The question is withdrawn.

Q. Over private wires?

Mr. Kaufman: You are summing up with every question, are you not, Mr. Stryker?

Mr. Stryker: I object to this type of criticism. I will bow, of course, to the Court's ruling, but I submit that the question is proper.

The Court: Yes. We are not concerned here in the morals of wire tapping—not in the least.

Mr. Stryker: I understand, but I am concerned with the credibility of the witnesses and the surrounding circumstances in this case.

The Court: Yes.

Mr. Stryker: And that is why these gentlemen have been put on, according to Mr. Hardy's remarks this morning. Now, what was the last question, please?

(Record read.)

By Mr. Stryker:

Q. Over private wires—you have done that?
A. If you want to put it that way.
Q. Well, I want to put it the way that the fact is.
A. O.K.
Q. Then, that is the fact?
A. Over private telephone wires, if you want to put it that way.

Q. It is not the way I want to put it, but is that the fact?

A. That is the fact, yes.

Q. All right. Is there anything about my putting it that way that does not properly bring out the truth?

A. No. I did not in the course of my work at 91st Street or [fol. 573] 1200 Broadway come into contact with any law firms. With respect to lawyers, Mr. Bernstein was in I think when we made the first installation with Inspector Shea and two other men from the federal offices here. (1246-50.) Mr. Bernstein is not a technician. I did not require his services at all in order to ascertain how to put these machines in or how to work it.

By Mr. Stryker:

Q. Well, did you ever have any of these machines in any law office, either Silver & Bernstein, or any other office?

A. We have had these machines in possibly a good many offices.

Q. I do not blame you for your answer. The question was not explicit. I mean this: These machines, have you had them in any other law office since you made these particular recordings in this case?

Mr. Kaufman: I object to the question, your Honor, because I do not see the relevancy of it to the issue here. The sole question is whether he installed them accurately at 1200 Broadway and at 32 West 91st Street.

The Court: Mr. Stryker is entitled to some latitude on cross examination. Overruled.

Mr. Kaufman: I submit, your Honor, that this man has probably installed an awful lot of these things, and some were probably confidential.

The Court: Well, we are not going into any other installations that he made a year ago or three years ago or anything like that. Nothing of that confidential sort will be brought in here.

Mr. Stryker: I can assure you that I shall not ask for any confidential information involved in any other case; but I would like to know how this man and his detective agency works, and that is what I understood he was brought here for.

The Court: Go ahead.

Mr. Stryker: What was the last question?

(Record read.)

Q. Now, please bear in mind that I am not, in that ques-
[fol. 574] tion, seeking to elicit testimony about some other case at all. I mean did you take these records that you used in this case, as you have testified—did you have those in any other or in any law office other than the Government office at any time? I said, I believe, "records", but I meant to say "these machines or records that you used in this case."

Mr. Kaufman: You mean the machines that were at 1200 Broadway and at 91st Street?

Mr. Stryker: Yes, just exactly that.

The Court: Suppose you put the question again—there has been so much talk about it.

Mr. Stryker: Yes.

Q. You had a machine similar to this thing over there on the table (indicating) at 1200 Broadway, did you not?

A. That is correct.

Q. Where you could listen in on the Weiss wires?

A. Yes. I had another machine at the 91st Street address. It is correct that there came a time when I got through listening at these places and my job was done and my records were all made.

By Mr. Stryker:

Q. Why do you hesitate? Do you mean that you are still going on with it?

A. There was no hesitancy there at all.

Q. Well, are you still going on recording conversations right now?

A. No.

Q. I do not mean at this moment, but during this trial?

Mr. Kaufman: Oh, Mr. Stryker, you can have my word that we are not.

Mr. Stryker: This witness was tendered to me, and he is put on here for an express purpose——

Mr. Kaufman: You asked a question, and I have offered you my word——

Mr. Stryker: But I am entitled to an answer, I submit.

The Court: He may answer.

Mr. Stryker: Will you read the question?

[fol. 575] The Court: The substance of it was this; whether there are still sound apparatus of machines on those wires.

Mr. Stryker: Yes, that was it.

The Court: That is, the Weiss wires and the Schuyler wire—the Bogardus wires and the Schuyler wire.

Mr. Stryker: Yes, precisely.

The Witness: No, there are not.

By Mr. Stryker:

— When were they taken off?

A. I can give you only possibly an approximate date, without looking in my memorandum book.

Q. Have you got your memorandum book with you?

A. Yes, I have.

Q. Well, take a look at it, and tell me?

A. (After examining book) I haven't got it in this one.

The Court: Give us the approximate date.

The Witness: The approximate time was, as near as I can recal-, somewhere around in May—the latter part of May or the fore part of April.

Q. Does not your memorandum book enable you *go* give better than an approximate time? Does it not tell you exactly when it was?

A. The only memorandum I have is the date of installation.

Q. What did you look at which enabled you to say it was the latter part of May that you took those things out?

A. Well, that is my memory of the approximate date. I would not attempt to give an accurate date without the memorandum book, where I have all that listed—when we made the installation, and also when we took them out.

Q. Then, that book which you have now does not help us?

A. No. I thought it did, but it does not.

Q. All right. That is a different book, then?

A. Yes.

Q. Now, have you, since these records were made, had this machine or a similar one in any law office, on which the rec- [fol. 576] ords were played, prior to the beginning of this trial?

Mr. Kaufman: If Mr. Stryker will step up to the bench and state his reason for this——

Mr. Stryker: I am asking a question, and I do not want to step up anywhere.

Mr. Kaufman: I still think that he is attempting to bring out a lot of confidential matter—"any law office"—and I submit that they must have had an awful lot of dealings with law offices.

Mr. Stryker: Mr. Hardy stood up here this morning——

The Court: As I understood, the question had to do only with these machines and whether these records were played.

Mr. Kaufman: Oh, then, all right. The objection is withdrawn.

Q. Have you?

A. No, none of these machines has been used for playing records in any law office. I understood that was your question.

(1251-5)

Not to my knowledge were these records played in any law office. I do not know that these records were in any law office at all. The only source of deposit for the records was in Frank Shea's office, and they were given into his possession, and what happened to them after that I don't know.

I have been in Silver & Bernstein's office. The first time that I was there was some months ago. The memorandum book which I have will not tell me the date that I was first there.

By Mr. Stryker:

Q. Give me your best recollection of when, for the first time, you went to the office of Silver & Bernstein?

A. Well, I might have been in their office five or six times all told, approximately.

Q. But can you tell us when for the first time?

A. It might have been around three years ago or two and a half years or three years ago or something like that, as near as I can tell.

Q. About three years ago—and that would be about 1935?

[fol. 577] A. That would be as near as I could check.

Q. And were you in their office then in connection with looking into some matter connected with this case?

A. Connected with other cases.

Q. Not this case?

A. No.

Q. Or with these defendants whom I represent, the two Weiss brothers, lawyers?

A. No; on other recording only for Mr. Bernstein.

Mr. Kaufman: The answer is "no", is it not?

The Witness: Yes, I will say "no".

Mr. Stryker: I object to this highly improper interruption—shouting at the witness "no". I submit that is quite improper.

The Court: Go ahead.

The Witness: May I make a statement on this?

Q. Yes, you may say anything you want.

A. Due to the fact that there are many attorneys that are using our service for recording purposes, it is hard to give a clean answer, as you see, as to what we are doing in particular instances, because there are other cases where we use microphones, as well as where we record on the wire. They employ our services for that purpose, and a lot of that is confidential information.

Q. I will not ask who the lawyers are or anything of that kind. I am not interested in that, and I only want to find out generally. Then, you use this information for lawyers in connection with private civil cases?

A. For their own personal use.

Q. I do not care what the use is, but you accept pay and are hired to install these machines on private wires in private cases, where the police have not been called in or are not present?

A. No, we do not. You misunderstood my statement. For microphone purposes only. The only time that we record from telephone wires is with the authority of the police department.

These machines are manufactured for our own purpose and use only and they are not sold to any individual. We do not rent them to anyone nor do we loan them to any- [fol. 578] one. We do not use them, or these telephone-listening machines, in connection with cases other than criminal cases.

Our detective agency does not handle divorce work. I personally do not do any other detective work other than in connection with the technical part of these machines. Well, it is possible that our company does do shadowing or the usual detective work, but that is something that I have not

any connection with at all, and I personally do not know about that. I do think that our concern does that kind of work.

The first time that I saw Silver & Bernstein or either of them in connection with any matter related to the Weiss brothers was when the installation was made at 1200 Broadway.

By Mr. Stryker:

Q. Without mentioning the names of companies or the matter—I do not care about that—but your prior contacts and visits with Silver & Bernstein related to work in which the clients of the firm were insurance companies?

A. Will you repeat that question? I did not get it clearly.

Mr. Stryker: Read it, please.

(Question read.)

Mr. Kaufman: You mean clients of the firm of Silver & Bernstein?

Mr. Stryker: Yes, or his either—I don't care which.

The Witness: I don't think I can answer you in that way.

Q. Well, all right.

A. I will put it this way, if you want me to—that my contacts with the office of Silver & Bernstein were on other work that they were doing, not in conjunction, and I think that is about the clearest answer I could give you.

Q. Well, I may be very dumb, but it is not at all clear to me. You have not told me who the clients were, and that is what I want to know; not their names, but were they insurance companies or not?

A. Not to my knowledge.

Q. What?

A. Not to my knowledge.

[fol. 579] Q. Not to your knowledge?

A. That is right. I mean that I do not know of my own personal legal knowledge as to whether my work was to be in connection with the insurance companies. Silver & Bernstein did not tell me that this job was for insurance companies. I can answer "no" on that. I had heard mentioned in that office while I was working at the time something said about insurance companies—that there was an investigation along that line. That was not in 1935. I do not say that

when I first met the firm of Silver & Bernstein that it was in connection with the insurance investigation.

By Mr. Stryker:

Q. You told me you were first in Silver & Bernstein's office in 1935, did you not?

The Court: This line of questions has no relation to any particular date——

Mr. Kaufman: Your Honor, I must object to these questions along this line, because I do not see that it has to do with the accuracy of these records.

The Court: Well, we will take a short recess. Will counsel step up?

(1255-1260a)

By Mr. Stryker:

Q. Mr. Simpson, will you tell me again so that I understand it clearly, there were taps on all of the Weiss brothers' wires, were there not?

Mr. Kaufman: I think this witness has testified that he did not place the taps on those wires.

Mr. Stryker: Well, I will ask him if he knows.

The Court: Ask him if he knows.

Mr. Kaufman: I think the question is misleading, your Honor.

Q. Do you know how many wires of Weiss brothers were tapped?

A. All I know is that 4-4850, 4851, 4852, 4853 and 4854.

[fol. 580] Mr. Stryker: What is misleading about that Mr. Kaufman?

Q. How many?

A. Five wires.

It is correct to state that from the time I had this machine working at the premises and these girls with earphones and so on, who were listening in, that every call that went out and every call that went in to the Weisses office over those five wires were recorded. I did not tell Mr. Kaufman on my direct examination that there were some 1400 records made. I cannot give you an answer as to whether or not 1400 records were made. My best answer, which is not the exact number, is that there were probably about 1400 rec-

ords made and it might have been a lot more as far as I can recall.

By Mr. Stryker:

Q. Now some of these calls that you listened in on were calls to Philadelphia, Boston and other places outside of the State, were they not?

A. Might have been. Any call that came in would be recorded and listened to, any call going out, I couldn't tell you where from.

Q. If any call was made on the Weiss brothers' wires during this time, you listened in and recorded it?

A. Yes, sir.

Mr. Kaufman: I ask the Court to take judicial notice of the fact that there was nothing illegal at that time as to calls going to New York, Boston, Philadelphia, or any other point.

Mr. Stryker: Can not we have law objections?

Mr. Kaufman: That is an objection. I ask the Court to take judicial notice of that fact.

The Court: It is not material at all at this time. The witness has not said there were such calls; "if there were" he listened in on them.

Q. Do you remember some yourself?

A. No, I do not.

Q. Well then all the business that was transacted over the Weiss wires with whatever private clients they were, and whatever it was, entirely unrelated to the case involved here, were all listened in on and put on record?

[fol. 581] A. Every ingoing and outgoing call was recorded.

Q. And all the information you got in that way, whether related to this case or not, all of that was turned over to the insurance companies?

A. It was turned over to Frank Shea, Inspector Shea.

Q. But Silver & Bernstein, lawyers for the insurance companies, they all had access to that?

A. Not to my knowledge.

Q. What?

A. They might have.

Q. Don't you know?

A. No.

Q. Were you not ever present when those things were played in the United States Attorney's office?

A. Yes, sir, once or twice when I played them myself.

Q. Aren't you the man that they call for when they wanted to hear those things played?

A. I did that.

Q. For whom?

A. Only for Mr. Kaufman.

Q. In some instances when you did it Silver & Bernstein were present?

A. No, they were not.

Q. Did you ever take any of these records to the office of Silver & Bernstein?

A. No.

Q. But you were in their office after you began tapping the Weiss brothers' wires?

A. Previous to that?

Q. Previous and after?

A. Yes, sir that is correct.

I have no knowledge of anything in connection with wire tapping as to whether anyone from Mr. Harley's office worked on this case before I made the installations on March 9th, 1937, except that on January 29th, 1937 I listened in to some talk of Dr. Messman beginning on that day. On March 9th, 1937, I did the installation on Weiss' wire. No, I don't know of any connection in which there was any listening in on the Weiss's wire prior to March, 1937.

Prior to March, 1937 on No. 1200 there was headphone installations for approximately four or five days as near as I can recall. As far as my personal knowledge goes, or [fol. 582] from what I heard, there were no tap recordings of the Weiss brothers' wires prior to January 29th, 1937. It depends upon what our demand is as to how many of these machines we make a year. There is no particular average as to how many we make a year but we might make two. We have eight machines on hand, and that is about all the recording equipment we have that registers. If they are all in use we might make another piece of apparatus. Outside of that, that is all.

By Mr. Stryker:

Q. Does the Harley office show the record of when your office went to work in tapping the wires of the Weiss brothers?

Mr. Kaufman: They didn't do that.

Q. A record of the Weiss tapped wires?
A. I can't answer that: I have no connection with it.
Q. You don't have anything to do with the accounting?
A. No.
Q. Do you know whether or not Harley got $75,000 from the insurance companies for this job?
A. I couldn't answer this question because I don't know.
Q. What?
A. I don't know.

Mr. Kaufman: I object to that, if your Honor please, upon the ground that there is no evidence that they did any work for any insurance company.

The Court: The witness says he does not know.

Q. Did you ever have any talk with Silver or Bernstein about that subject?
A. No, I did not.
Q. What?
A. No.
Q. Did Harley ever say anything to you about it?
A. No—no, he didn't. I was going to qualify that.
Q. Take your time.
A. No, he didn't.
Q. How are you going to qualify it?
A. My first knowledge or instruction, as I stated before in 1200 was when Mr. Harley spoke to me about it; I was to go downtown and make that installation, and it is the policy of the office on any work that comes there, no matter [fol. 583] from whom, we know nothing about it except make the installation.
Q. It is carefully provided that you be kept out of knowledge of that subject so that you cannot testify about it?
A. I wouldn't put it that way.
Q. How would you put it?
A. Just the stated policy of the office, no man knows what the other is doing.

I never heard from Mr. Harley or anyone in his employ or connected with him who tapped any telephone wires without having previous alleged permission from the police. I know that. I do all the installation work. I have not done any installation work for lawyers of insurance companies, none at all. I have not done any installation work for lawyers of insurance companies.

The Court: I think the examination should be limited to the accuracy of the work he did. I will allow any amount of that, as to what he did. Anything tending to show that the record was defective or anything bearing at all upon the accuracy of what the witness has testified to on direct examination that he did.

Mr. Stryker: Of course I immediately bow to whatever ruling your Honor makes. I wish to make myself plain to the Court the reason I am cross-examining this way is because of the statement that Mr. Hardy made at the opening of this trial in which he referred to my point, that he was going to produce evidence to countervail evidence that the insurance companies were back of this investigation, and that is the purpose of changing the program. It is because of that statement made in the presence of the Court and jury that I am cross-examining the witness now. However, if your Honor directs me to cease, I will cease immediately.

The Court: I don't think the cross-examination is proper along that line.

Mr. Stryker: I take an exception, your Honor. That is all.

(1261-67)

[fol. 584] Cross-examination.

By Mr. Schwartz:

I stated that telephone taps were placed on 1200 and 1201 at 1200 Broadway. Five pairs of taps were placed on five wires. If all five wires became engaged at one time, then only two recordings would be made at one time on the records. The other three wires became active and at the same time the stenographers would take down in shorthand what went in. The machines could make two records from two wires at the same time. I didn't say that the stenographers were there for the purpose of correcting the conversation. The stenographers were there to take down anything in shorthand, anything that came over that they were on. The stenographers who were there were not particularly there for the purpose of checking up in that way between the conversations recorded and the conversations taken by the stenographers. That could be done, but no efforts were made to do so.

By Mr. Schwartz:

Q. These girls that were on the switchboard were not given any instructions to single out any particular call?

A. Not to my knowledge. You see those girls were not under my supervision, so I had nothing to do with it.

Q. The girls on the switchboard?

A. The switchboard and the monitor; only the recording apparatus.

Q. In other words you had how many employees in that place under your supervision?

A. Just two at a time.

Q. One on each machine?

A. Yes, sir.

Q. What came in over the switchboard you have no control of. I mean in other words your company had nothing to do with anyone else but the two operators?

A. That is all we were responsible for.

Mr. Schwartz: That is all.

Redirect examination.

By Mr. Kaufman:

I never put a tap on any telephone wire.

[fol. 585] FRANK E. SHEA, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Hardy: (1269)

I am now and for the past 45 years have been in the service of the United States Government. I have always been in the Postal Service branch and have been postal inspector for the past 25 years. I was assigned to the investigation of disability fraud cases in December 1936 and since that time up to the present moment. I have occupied all my time in connection with that investigation.

By Mr. Hardy:

Q. Inspector Shea, there was a conference in the United States Attorney's office, I think in January, 1937. I want

you to tell the court and jury who were there and what was the subject of the conversation.

Mr. Stryker: I object to it as pure hearsay. It can not have any bearing on any issue in this case, your Honor.

The Court: Sustained. What is the bearing? I will allow you to develop it, Mr. Hardy, what the point is.

Mr. Stryker: Obviously conversations in Mr. Hardy's office are no more germane than made in any other lawyer's office.

The Court: As a result of the conversation did you receive certain instructions?

Mr. Hardy: I was leading up to that, your Honor.

The Witness: I did, your Honor.

Q. Will you proceed and tell what the discussion was and who were there and what instructions you received.

Mr. Stryker: I object to it. What the men did there, if germane, is admissible. The conversations in Mr. Hardy's office are no more admissible than conversations in any other lawyer's office.

The Court: Normally they would not be. If you want to come up here, Mr. Hardy and you other lawyers, and tell me what the point is you may do so.

[fol. 586] (Conference between Court and counsel, not within the hearing of the jury.)

The Court: You may ask him if he received instructions and what he then did.

In January 1937 I received instructions from Mr. Hardy to tap the wires of Dr. Hirsch L. Messman and the Weiss brothers. I was instructed to have those wires tapped at the earliest possible moment and not only get stenographic notations in reference to the calls, but if possible to have a sound recording put in, so that the stenographic record would be corroborated by the sound recording.

I personally knew John S. Hardy for many years; in fact I worked for him in other cases and I knew he had such devices, and I went to his office and put the proposition before him, and he agreed to supply me with the records.

I then got in touch with the Police Department, Deputy Chief Inspector John A. Lyons, who is now Deputy Commissioner, and told him my problem. He appointed Detective McGlynn and Detective Lewis to tap the wires. On January 28th I went to the neighborhood of where Dr. Messman lived. He lives at 315 Central Park West, and

the detectives decided that the best place to bring the wires in was at 32 West 91st Street. I went to that place, saw the landlord and told him I am Post Office Inspector Shea, and I am doing some government work, and I wished to hire the rear apartment, and I paid him, and that evening Mr. Harley came with the recording apparatus and we installed it. The next morning, January 29th, started to work. Mr. Irving Kaufman, Assistant United States Attorney, came up there and saw how the apparatus worked.

From that time until a short time after the arrest of Dr. Messman those machines were in constant operation under my supervision, and each day, or rather each night, the records were brought to this building to Mr. Hardy's office or to my office, where I supervised the initialing, to see that everything was regular as to date, time of call, the operators on the machines were on there and also the stenographers. I then filed them away personally in a locked cabinet where no one had access to it but the Assistant United States Attorney's office.

[fol. 587] By Mr. Hardy:

Q. Now will you tell us about tapping Weiss Brothers' wires. What did they do there?

A. That was later on. We tapped the Weiss's five wires on February 23rd. In company with the detectives we found that we could only get into an office building at 1200 Broadway. On account of the secrecy of the case and also due to the fact that we had to get a lease, I spoke to Mr. Bernstein and asked him could he obtain and somebody take a lease of the place only during this operation at 1200 Broadway. He did so, and later on when this case was over I went to the owner of the place and had the lease cancelled, and told him it was entirely a government proposition.

Q. Did Mr. Bernstein go to either one of the places where this recording machine was installed and listen to the conversations?

A. No. He was there the first night, he was rather curious to see how the thing operated, and I didn't see him there after that. In the same instance I saw him at 1200 Broadway for a short time.

Q. Did you listen to any conversation yourself?

A. I did. In fact during all the wire tapping I worked with the police. I also verified the fact we are on the right

wire after the police had, so that no mistake would be made. I also listened to the conversations.

For the past 20 to 25 years, I have supervised wire tapping on behalf of the Government, and principally since the Gerald Chapman case in 1921. There were certain stenographers furnished in connection with the wire tapping in this case. Those stenographers took down through earphones the conversations and calls that came over the two different telephones, and they supplemented, as a matter of fact corroborated the sound recordings. They were also filed in the office of the United States Attorney.

By Mr. Hardy:

Q. Where did those girls come from, what office?

A. We didn't have any girls, so we got girls from Mr. Silver and Mr. Bernstein. I knew Mr. Silver when he was [fol. 588] an assistant United States Attorney and when he was chief of the Bureau of Indictments.

Q. Do you know Mr. Bernstein?

A. I don't know him so well, but I knew he was a law partner of Mr. Silver.

Q. Do you know a lawyer by the name of Pantaleoni?

A. Very well. He was also an assistant United States Attorney about ten years ago. He is a lawyer now, and I understood later that these lawyers also represented the insurance companies.

Q. Now when you saw Mr. Simpson supervising the recording machines, did he have any assistants with him?

A. He had one assistant that would relieve him at times when he would go out for lunch, and that was all.

Q. How often would you go to the premises where these recording machines were located?

A. Several times a week or at any time when I thought I ought to be around there.

I recall the names of the stenographers that were used in taking down these wire taps. Those girls were Sylvia Schwartz, Irene Meyers, Marcia Meyers, Margaret Hartert, Olga Romano, Bessie Metcalf. I think that is about all. These young ladies alternated between two places, namely, 91st Street and 1200 Broadway. These girls operated from both of these places and they conferred with me almost daily.

By Mr. Hardy:

Q. When these discs were brought here, you said each day——,

A. Each day, each evening.

Q. Did you check those discs to see if they were labeled?

A. I did. Before I filed them away I went over to see if four or five different notations that would identify each record would be on one, as to location, whether 91st Street or whether 1200 Broadway; also as to the date and the operator, and also the time the record was taken, the hour of the call.

Q. Now in the wire tapping on the Messman wire, how many notations were placed on each disc?

A. There are only five on that because we just had one telephone. Dr. Messman had only one phone, and therefore [fol. 589] we had only one notation. That was 91st Street for the location; and then the other five notations on the Weiss's.

Q. How many notations on the Weiss wires?

A. Six.

Q. Why did you have to have one more than on the Messman wire?

A. For the simple reason there were five wires involved in the Weiss cases.

Q. Now did you make any arrangements with Mr. Hardy about his fee?

A. I did.

Q. Charges for the use of the recording machines?

A. I did not.

Q. Do you know who paid his bill?

A. I believe Mr. Silver and Mr. Bernstein.

Q. The government didn't do it as far as you know?

A. No, sir, as far as I know.

Mr. Stryker: No questions.

Mr. Hardy: Wait a minute.

Mr. Stryker: I thought you were through, Mr. Hardy.

Q. Inspector, did Mr. Harley have anything to do with this investigation so far as you know except to furnish recording machines?

A. He had nothing whatsoever to do with the investigation. The only thing Mr. Harley asked me was had the

police tapped the wires. He said otherwise he would not go in on the case. That was the only question he asked me.

Q. As a matter of fact, didn't you bring him down to my office on one occasion when he said he would not go ahead unless he received authority from the government?

A. That is true. That is what I referred to.

Q. Did you have any fund in your possession to pay for the recording machine?

A. I did not.

Q. Do you know the connection of Mr. Pantaleoni in this matter or his firm?

A. I do.

Q. Pantaleoni is a member of the firm of Hodges, Reavis, Pantaleoni & Downey, and they also represent the insurance companies and he is a member of that firm?

A. Yes, sir.

Q. And Frank Reavis is a former assistant United States Attorney?

[fols. 590-2032] A. Yes, sir, I knew him. He used to be here in the office of the United States Attorney.

Mr. Hardy: That is all.

Mr. Stryker: No questions.

Mr. Hardy: Your Honor, it will take a few minutes to get Dr. Messman down.

The Court: Will he be the next witness?

Mr. Hardy: Yes, your Honor.

The Court: We will take a recess now until 2 o'clock.

(Recess at 2 P.M.)

[fols. 2033-2067] Martin Gross, called as a witness on his own behalf, first being duly sworn, testified as follows: (4079)

[fols. 2068-2604] Cross-examination.

By Mr. Dailey: (4189)

[fols. 2605-2615] Motion to Set Aside Verdict—J. J. Weiss

Mr. Stryker: If your Honor please, I move in behalf of the defendant J. J. Weiss to set aside the verdict on the ground that the same is contrary to the law, contrary to the evidence, contrary to the weight of evidence, upon all

the objections and exceptions taken throughout the course of this trial, and particularly and specifically upon the objections and exceptions with relation to the introduction of wire tapping evidence, in violation, as I claim, of the Federal Communications Act and of the Fourth and Fifth Amendments of the United States Constitution, and on the same grounds I move an arrest of judgment.

MOTION TO SET ASIDE VERDICT—MARTIN GROSS

Mr. Friedman: I make a similar motion on behalf of the defendant, Martin Gross, and in addition to the grounds specified by Mr. Stryker, I make my motion on the ground that the action of the trial court, whom we all respect, in directing the jury to return a verdict in a conspiracy case——

[fol. 2616] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION SETTLING BILL OF EXCEPTIONS

It is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto, that the foregoing is a true transcript of the record of the said District Court, in the above entitled matter as agreed on by the parties and contains all the evidence taken on the trial of this action; that the same has been prepared within the time allowed by law and the Court, and that it may be settled and ordered on file as the Bill of Exceptions herein.

Dated: New York, September 30, 1938.

Lamar Hardy, Attorney for Plaintiff-Respondent. Lloyd P. Stryker, Attorney for Defendant-Appellant, Joseph J. Weiss. Schwartz & Frohlich, Attorneys for Defendant, Maximilian Goldstein. Sylvan Schwartz, Attorney for Defendant, George [fol. 2617] Krupp. Jacob W. Friedman, Attorney for Defendant, Martin Gross.

[fol. 2618] In United States District Court, Southern District of New York

[Title omitted]

Order as to Record and Bill of Exceptions

Upon the stipulation of the United States Attorney for the Southern District of New York and the attorneys for the appellants, Joseph J. Weiss, Maximilian Goldstein, George Krupp and Martin Gross annexed hereto and dated the 30 day of September, 1938, it is

Ordered, that the foregoing record be ordered on file as the Bill of Exceptions and transcript of record in the above entitled matter.

Dated: New York, September 30, 1938.

Robert P. Patterson, U. S. D. J.

[fol. 2619] In United States District Court, Southern District of New York

[Title omitted]

Order Settling Bill of Exceptions

The foregoing is hereby certified and allowed as the Bill of Exceptions and comprises the record of all the material evidence in this case and of all the exceptions taken by the defendants Joseph J. Weiss, Maximilian Goldstein, George Krupp and Martin Gross herein at the trial hereof.

Dated: New York, September 30, 1938.

Robert P. Patterson, U. S. D. J.

[fol. 2620] In United States District Court for the Southern District of New York

[Title omitted]

Notice of Appeal of Joseph J. Weiss

Name and address of appellant:

Joseph J. Weiss, 1540 54th Street, Brooklyn, N. Y.

Name and address of appellant's attorney:

Lloyd Paul Stryker, 40 Wall Street, Borough of Manhattan, New York City.

Offense:

(a) Counts 1 to 19 charge use of the mails in furtherance of the scheme to defraud certain insurance companies in violation of Title 18, U. S. C. Section 338, Section 215 U. S. C. C.

(b) Count 20 charged a conspiracy to use the mails to defraud in violation of Title 18, U. S. C., Section 88.

Date of Judgment: March 7, 1938.

Brief description of judgment or sentence:

Defendant was sentenced to three years on each of the counts numbered 1 to 19 inclusive, except counts 8 and 12 which were dismissed at close of Government's case; two years on count 20; all sentences to run concurrently.

Name of prison where now confined if not on bail:

The defendant has been released on his own recognizance pending the determination of his appeal.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment above named, on the grounds set forth below.

Dated, New York, March 11, 1938.

Joseph J. Weiss, Appellant.

[fols. 2621-2625] GROUNDS OF APPEAL

1. The District Court erred in admitting into evidence discs containing the contents of a great number of telephone conversations and typewritten transcripts thereof, obtained as a result of tapping telephone wires, in violation of the Fourth and Fifth Amendments to the Constitution of the United States of America, in violation of Title 47 U. S. C. A., Section 605, otherwise known as the Communications Act (June 19, 1934, c. 652, Section 605, 48 Stat. 1103), in violation of the decision of the United States Supreme Court in United States v. Nardone, 302 U. S. 250, and in violation of Section 1423 of the Penal Law of the

State of New York, and that the District Court erred in permitting said discs to be played upon a phonograph machine before the jury.

2. The District Court erred in permitting witnesses to refresh their recollection from the aforesaid telephone conversations which were obtained by the tapping of telephone wires.

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[fols. 2626-2649] In United States District Court
Southern District of New York

[Title omitted]

Assignments of Error of J. J. Weiss

Now comes Joseph J. Weiss, one of the defendants herein, and files the following assignment of errors and respectfully shows that error has intervened to his prejudice, to wit:

• • • • • • •

[fol. 2650] (20) The District Court erred in admitting into evidence, over objection and exception of counsel, discs recording the contents of a great number of intrastate telephone conversations and the typewritten transcripts of said discs, said records having been obtained as a result of the tapping of telephone wires, in violation of the Fourth and Fifth Amendments to the Constitution of the United States of America, Title 47 U. S. C. A., section 605, otherwise known as the Communications Act (June 19, 1934, c. 652, section 605, 48 Stat. 1103), the decision of the United States Supreme Court in United States v. Nardone, 302 U. S. 250 and Section 1423 of the Penal Law of the State of New York, and that the District Court erred in permitting said discs to be played upon a phonograph machine before the jury.

Post Office Inspector Frank Shea testified that following a conference in the United States Attorney's office in January 1937, he received instructions to tap the wires of Dr. Hirsch L. Messman and J. J. & A. L. Weiss and not only to get stenographic records, but if possible, to have a sound recording machine so that the stenographic record would be corroborated by the sound recording. He communicated with the Police Department of the City of New York.

Two city detectives made the physical taps. Dr. Messman's wire was tapped on January 28, 1937 and the Weiss wires were physically tapped on February 23, 1937. He communicated with John S. Harley who agreed to supply him with the sound recording apparatus, which was installed. The Government did not pay for the use of the recording machines. It was paid for by Mr. Silver and Mr. Bernstein who represented the insurance companies. Certain stenographers took, through the ear phones, the conversations. These girls were furnished by Mr. Silver and Mr. Bernstein who represented the insurance companies. The records were brought to Mr. Harley's office or to Inspector [fol. 2651] Shea's office where he supervised the initialing and filed them in a cabinet. Mr. Simpson of the Hartley Private Detective Agency, who supervised the mechanical recording apparatus, testified:

"Q. And I think you told Mr. Kaufman on your direct examination, correct me if I am in error, that there were some 1400 records made? A. No, I didn't.

Q. Give me your best answer. I don't care for an exact number. A. It probably was that number, might have been a lot more, as far as I can recall.

Q. Now some of these calls that you listened in on were calls to Philadelphia, Boston and other places outside of the State, were they not? A. Might have been. Any call that came in would be recorded and listened to, any call going out. I couldn't tell you where from.

Q. If any call was made on the Weiss brothers' wires during this time, you listened in and recorded it? A. Yes, sir.

* * * * * * *

Q. Well then all the business that was transacted over the Weiss wires with whatever private clients they were, and whatever it was, entirely unrelated to the case involved here, were all listened in on and put on record? A. Every ingoing and outgoing call was recorded." (Underscoring ours.)

Counsel for the defendant Joseph J. Weiss objected to the admission into evidence of the recorded telephone conversations obtained as a result of tapping of wires and the typewritten transcripts thereof and the reading of said transcripts and the playing of the records, upon the

ground that they were obtained as a result of tapping telephone wires in violation of the Fourth and Fifth Amendments of the Constitution of the United States of America, in violation of Title 47, U. S. C. A. section 605, in violation of the decision of the United States Supreme Court in United States v. Nardone and in violation of the Penal Law of the State of New York, and excepted to the Court's overruling said objection and permitting said recorded conversation and typewritten transcripts thereof to be received in evidence to be read and to be played.

It is understood between Court and counsel that the said objection which was raised to the introduction of the first [fol. 2652] telephone record and typewritten transcripts and the exception to the Court's ruling thereon was a general blanket objection covering all wire taps and the typewritten records thereof, typewritten transcripts thereof and the information so used.

"Mr. Stryker: Pardon me, there seems to be some confusion as to whether I have taken the objection, whether it applies. I thought it applied all the way through.

The Court: I will so understand it. You made it clear on the record.

Mr. Stryker: I thought I made it clear, your Honor.

. . . . . .

"Q. Did you recognize Mr. Weiss's voice? A. Yes, sir.

Mr. Dailey: I will have this played.

Mr. Stryker: It is some time since this happened and I presume my understanding of the circumstances is that this is all subject to the objection I made so many days ago.

The Court: Yes. Many of these telephone calls have been put in evidence either as records or typewritten statements, purporting to be copies of records, and they are all taken over the objection of the defendants and an exception to the defendants.

. . . . . .

"Q. Did you have that conversation? A. Yes, sir.

Mr. Dailey: And Mr. Stryker will concede the qualification of the record and the transcript; is that so?

Mr. Stryker: Yes.

Mr. Dailey: I offer them in evidence.

(Government's Exhibits Nos. 218 and 218-A for Identification received in evidence.)

The Court: There is no objection beyond the running objection?

Mr. Stryker: Yes, I understand that the general objection covers all of these.

The Court: Yes. That is my understanding."

The United States Attorney conceded in his summation [fols. 2653-2654] that the tapping records were the "crux of this case * * *."

* * * * * * * *

[fols. 2655-2656] Wherefore, the defendant Joseph J. Weiss prays that the judgment herein be reversed, and that the sentence imposed on said judgment be set aside

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[fol. 2657] In United States District Court, Southern District of New York

[Title omitted]

Notice of Appeal of Dr. Maxmilian Goldstein

Name and Address of Appellant:
Maximilian Goldstein, 829 Park Avenue, New York, N. Y.

Name and Address of Appellant's Attorneys:
Schwartz & Frohlich, 1450 Broadway, Borough of Manhattan, New York City.

Offense:
Violation of Title 18, Section 338 of the United States Code (U. S. Criminal Code, Section 215) and Title 18, Section 88 of the United States Code (U. S. Criminal Code, Section 37).

The indictment consisted of twenty counts, viz.:

(a) Counts 1 to 19 inclusive charged appellant with using the mails for the purpose of executing an alleged scheme and artifice to defraud in violation of 18 U. S. C., Section 338 (U. S. Criminal Code, Section 215).

(b) Count 20 charged appellant with conspiring to commit an offense against the United States, to wit, to violate 18 U. S. C. Section 338, in violation of 18 U. S. C. Section 88 (U. S. Criminal Code, Section 37).

Counts 8 and 12 were dismissed at the close of the Government's case.

Date of Judgment:
March 7, 1938.

Brief Description of Judgment or Sentence:
Upon Counts 1 to 7, and Counts 9 to 11, and Counts 13 to 19, the Court sentences the appellant to imprisonment for one year and one day; upon Count 20, the Court sentences the appellant to one year and one day, all sentences to run concurrently with each other; no fine was imposed upon the appellant.

Name of Prison where now confined if not on bail:
Appellant was released on his own recognizance pending [fol. 2658] appeal by order of Hon. Robert P. Patterson, United States District Judge.

I, the above named appellent, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment above mentioned, on the grounds set forth below.

Dated, New York, March 11, 1938.

Maximilian Goldstein, Appellant.

GROUNDS OF APPEAL

* * * * * * *

[fol. 2659] 10. The Court erred in admitting, over objection of the appellant, evidence as to the contents of telephone conversations obtained as a result of and by means of the tapping of telephone wires, in violation of the pro- [fol. 2660] visions of 47 U. S. C. A. Section 605 (Act of June 19, 1934, C. 652 Section 605, 48 Stat. 1103), the provisions of the Fourth and Fifth Amendments to the Constitution of the United States, and the provisions of Section 1423 of the Penal Law of the State of New York, to which rulings the appellant duly excepted.

11. The Court erred in permitting, over the objection of appellant, the playing of phonograph records and the reading of transcripts purporting to set forth the contents of

telephone conversations obtained as a result of and by means of the tapping of telephone wires, in violation of the provisions of 47 U. S. C. A. Section 605 (Act of June 19, 1934, C. 652, Section 605, 48 Stat. 1103), the provisions of the Fourth and Fifth Amendments to the Constitution of the United States, and the provisions of Section 1423 of the Penal Law of the State of New York, to which rulings the appellant duly excepted.

• • • • • • •

[fols. 2661-2666] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENTS OF ERROR OF MAXIMILIAN GOLDSTEIN

Now Comes Maximilian W. Goldstein, one of the defendants herein and files the following assignment of errors, which he avers occurred upon the trial of this case and prejudiced his rights, and to which exceptions were taken, to wit:

• • • • • • •

[fol. 2667] (q) The District Court erred in admitting into evidence, over objection and exception of counsel, discs recording the contents of a great number of intrastate telephone conversations and the typewritten transcripts of said discs, said records having been obtained as a result of the tapping of telephone wires, in violation of the Fourth and Fifth Amendments to the Constitution of the United States of America, Title 47 U. S. C. A., section 605, otherwise known as the Communications Act (June 19th, 1934, c. 652, section 605, 48 Stat. 1103), the decision of the United States Supreme Court in United States v. Nardone, 302 U. S. 250 and Section 1423 of the Penal Law of the State of New York, and that the District Court erred in permitting said discs to be played upon a phonograph machine before the jury.

(r) The United States Attorney conceded in his summation that the wire tapping records were the "crux of this case" • • •."

• • • • • • •

(4) The District Court erred in admitting into evidence, over the objection and exception of counsel, evidence which had been obtained as a result of the tapping of telephone wires in violation of the Fourth and Fifth Amendments of the Constitution of the United States, and in violation of the Federal Communications Act, the decision of the United States Supreme Court and in violation of the Penal Law of the State of New York, and the District Court, erred in [fols. 2668-2671] permitting discs recording the contents of a great number of intrastate telephone conversations to be played upon a phonograph machine before the jury.

• • • • • • •

[fol. 2672] Wherefore, defendant Maximilian Goldstein prays that the judgment herein be reversed and that the sentence imposed on said judgment be set aside.

Schwartz & Frohlich, Attorneys for Defendant Maximilian Goldstein.

[fol. 2673] In United States District Court, Southern District of New York

[Title omitted]

Notice of Appeal of Martin Gross

Name and Address of Appellant: Martin Gross, 2523 Wallace Avenue, Bronx, New York.

Name and Address of Appellant's Attorney: Jacob W. Friedman, No. 160 Broadway, Borough of Manhattan, New York City.

Offense: Use of mails to defraud; and conspiracy.

Date of Judgment: March 7th, 1938.

Description of Judgment or Sentence: 3 years imprisonment on each mail fraud count; 2 years imprisonment on conspiracy count, all sentences to run concurrently.

Prison where now Confined: Bail continued pending appeal.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment above mentioned on the grounds set forth below.

(Signed.) Martin Gross, Appellant.

Dated New York City, March 11, 1938.

SUCCINCT STATEMENT OF GROUNDS OF APPEAL

1. The District Court committed error in receiving evidence, over objection and exception, certain phonograph records, in permitting them to be played before the jury and in permitting the jury to read what purported to be verbatim transcripts thereof, although it appeared that these records and transcripts had been made by the surrep-tious and illegal tapping of telephone wires, in violation of state and federal law and in violation of the constitutional rights of this appellant.

2. The District Court committed error in permitting witnesses, over objection and exception, to use the aforesaid records and transcripts thereof to refresh their recollections, all of which was illegal as aforesaid.

[fols. 2674-2675] 3. The District Court committed error in permitting this appellant, over objection and exception, to be cross-examined in an improper and prejudicial manner concerning the details of an apparent dictographic record of a purported conversation.

• • • • • • •

[fol. 2676] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENTS OF ERROR OF MARTIN GROSS

Now comes Martin Gross, one of the defendants herein, and files the following assignment of errors and respectfully shows that error has intervened to his prejudice, to wit:

(1) This defendant hereby reassigns, reiterates, realleges and incorporates herein with the same force and effect as if herein again set forth in extenso, all of the errors and specifications of error contained in the assignment of errors filed herein by the defendant Joseph J. Weiss.

(2) The District Court permitted this defendant, over objection and exception, to be cross-examined in an improper and prejudicial manner concerning the details of an apparent dictographic record of a purported conversation.

• • • • • • •

[fol. 2677] Wherefore, the defendant Martin Gross prays that the judgment herein be reversed and that the sentence imposed thereon be set aside.

New York City, September 26th, 1938.

Jacob W. Friedman, Attorney for Defendant Martin Gross, 160 Broadway, Borough of Manhattan, New York City.

[fol. 2678] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL OF GEORGE KRUPP

Name and address of appellant—Dr. George Krupp, 886 Fairmont Place, Bronx, New York.

Name and address of appellant's attorney—Sylvan Schwartz, 527 Fifth Avenue, New York City, N. Y.

Offense—Using the mails in furtherance of the scheme to defraud certain insurance companies in violation of Title 18, U. S. C., section 338, section 215 U. S. C. C. and a conspiracy to use the mails to defraud in violation of Title 18, U. S. C. section 88.

Date of Judgment—March 7, 1938.

Brief description of judgment or sentence—Defendant was sentenced to one year and one day on each of the counts numbered 1 to 7 and 14 to 20 inclusive; all sentences to run concurrently.

The defendant has been released on $1500.00 bail pending the determination of his appeal.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit, from the judgment above named on the grounds set forth below.

Dated, New York, March 9, 1938.

George Krupp, Appellant.

[fols. 2679-2681] GROUNDS OF APPEAL

First: The District Court erred in admitting into evidence discs containing the contents of a great number of telephone conversations and typewritten transcripts thereof, obtained as a result of tapping telephone wires, in violation of the

Fourth and Fifth Amendments to the Constitution of the United States of America.

Second: The District Court erred in admitting the aforesaid contents of a great number of telephone conversations obtained as a result of tapping telephone wires in violation of Title 47, U. S. C. A. section 605.

Third: The District Court erred in admitting the aforesaid contents of a great number of telephone conversations obtained as a result of tapping telephone wires, in violation of the decision of the United States Supreme Court in United States against Nardone, 302 U. S.

Fourth: The District Court erred in admitting the contents of a great number of telephone conversations obtained as a result of tapping telephone wires in violation of Section 1423 of the Penal Law of the State of New York.

* * * * * * *

[fols. 2682-2686] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENTS OF ERROR OF GEORGE KRUPP

Now Comes George Krupp, one of the defendants herein and files the following assignment of errors, which he avers occurred upon the trial of this case and prejudiced his rights, and to which exceptions were taken, to wit:

* * * * * * *

[fol. 2687] (q) The District Court erred in admitting into evidence, over objection and exception of counsel, discs recording the contents of a great number of intra-state telephone conversations and the typewritten transcripts of said [fols. 2688-2690] discs, said records having been obtained as a result of the tapping of telephone wires, in violation of the Fourth and Fifth Amendments to the Constitution of the United States of America, Title 47 U. S. C. A., section 605, otherwise known as the Communications Act (June 19th, 1934, C. 652, section 605, 48 Stat. 1103), the decision of the United States Supreme Court in United States v. Nardone,

302 U. S. 250 and Section 1423 of the Penal Law of the State of New York, and that the District Court erred in permitting said discs to be played upon a phonograph machine before the jury.

(r) The United States Attorney conceded in his summation that the wire tapping records were the "crux of this case • • •."

(4) The introduction of evidence obtained by means of the tapping of wires for the purpose of proving the conspiracy in which this defendant is claimed to have participated, was a violation of the laws of the United States and New York State and the evidence was in violation of the Fourth and Fifth Amendments of the Constitution of the United States of America, Title 47 U. S. C. A., Section 605, otherwise known as the Communications Act, the decision of the United States Supreme Court in United States v. Nardone, 302 U. S. 250, and Section 1423 of the Penal Law of the State of New York, and the District Court erred in permitting said discs or evidence obtained by this method to be presented to the jury.

[fol. 2691] Wherefore defendant George Krupp prays that the judgment herein be reversed and that the sentence imposed on said judgment be set aside.

Sylvan Schwartz, Attorney for Defendant, George Krupp.

[fol. 2692] In United States District Court

Southern District of New York

[Title omitted]

Order and Stipulation Fixing Time to Settle and File Bill of Exceptions.

Order—March 14, 1938

Upon reading and filing the annexed stipulation dated March 11, 1938, and upon all proceedings heretofore had herein, and the Court having granted the request of counsel for the appellants to settle and file with the clerk of this court a bill of exceptions on October 1, 1938, it is hereby

Ordered that the time of the defendants-appellants Joseph J. Weiss, Martin Gross, Maximilian Goldstein and George Krupp to procure to be settled and filed with the clerk of this court their bill of exceptions and assignment of errors and record an appeal, be and the same hereby is extended up to and including the 1st day of October, 1938. The term of this Court is hereby extended up to and including the 1st day of October, 1938.

Robert P. Patterson, United States District Judge.

[fol. 2693] [Title omitted]

STIPULATION

Whereas the Court, after the imposition of sentence in the above entitled matter on March 7, 1938, granted the request of counsel for the appellants to settle and file their bill of exceptions up to and including October 1, 1938, and the United States Attorney not having objected thereto,

It Is Stipulated by and between the attorney for the United States of America, appellee and the attorneys for the defendants-appellants in the above entitled matter, that the time of the said defendants-appellants to settle and file their bill of exceptions and assignment of errors and record on appeal, be and the same hereby is extended up to and including October 1, 1938, and that the term of this Court be and the same hereby is extended up to and including October 1, 1938.

[fol. 2694] Dated, New York, March 11, 1938.

Lamar Hardy, by Lamar Hardy, Attorney for Appellee; Lloyd Paul Stryker, Attorney for Defendant-Appellant, Joseph J. Weiss; Schwartz & Frohlich, Attorneys for Defendant-Appellant, Maximilian Goldstein; Jacob W. Friedman, Attorney for Defendant-Appellant, Martin Gross; Sylvan Schwartz, Attorney for Defendant-Appellant, George Krupp.

[fol. 2695] IN UNITED STATES DISTRICT COURT

C 100—451

Present: Hon. Robert P. Patterson, Judge.

U. S. Criminal Code, Section- 88 and 338 Title 18 U. S. C.

Using the mails in a scheme to defraud and conspiracy so to do.

UNITED STATES OF AMERICA

vs.

JOSEPH J. WEISS

JUDGMENT—March 7, 1938
(Joseph J. Weiss)

On motion of the United States Attorney, Ordered Sentence,

It is thereupon ordered and adjudged that the above named defendant be committed to the custody of the Attorney-General of the United States or his authorized representative, for imprisonment in a penitentiary for and during the term and period of

Three Years on each of counts 1-2-3-4-5-6-7-9-10-11-13-14-15-16-17-18-19. Two Years on count 20. All sentences to run concurrently. Bail continued pending appeal.

(March 8th, 1938—defendant paroled in own recognizance pending appeal.)

Robert P. Patterson, U. S. D. J.

COMMITMENT

(Joseph J. Weiss)

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

The President of the United States of America:

To the Marshal of the United States for the Southern District of New York and to Warden of the U. S. Northeastern Pen. at Lewisburg, Penna.

Whereas the foregoing judgment and sentence was pronounced against the defendant named therein,

[fol. 2696] And, Whereas, the Attorney-General of the United States had designated the above named institution as the place of confinement where the said sentence shall be served,

Now, this is to command you, the said marshal, forthwith to take and safely transport to said institution and there deliver to the officer in charge thereof the aforesaid defendant together with a copy of this writ; and you the officer in charge of said institution to receive, keep and imprison said defendant in accordance with said sentence, or until said defendant shall be otherwise discharged by due course of law. If said prisoner shall have been committed to a jail or other place of detention to await transportation to the place at which said sentence is to be served, said sentence shall pursuant to law begin on the date on which said defendant was received at such jail or other place of detention.

Witness, the Hon. Robert P. Patterson, Judge of said Court and the seal thereof affixed at New York City in said district this 7th day of March, 1938.

Charles Weiser, Clerk. (Seal.)

[fol. 2697] In United States District Court

C 100—451

Present: Hon. Robert P. Patterson, Judge.

U. S. Criminal Code, Section- 88 and 338, Title 18 U. S. C.

Using the mails in a scheme to defraud and conspiracy to do so.

United States of America

vs.

Maximilian Goldstein

Judgment—March 7, 1938

(Dr. Maximilian Goldstein)

On motion of the United States Attorney, Ordered Sentence,

It is thereupon ordered and adjudged that the above named defendant be committed to the custody of the

Attorney-General of the United States or his authorized representative, for imprisonment in a penitentiary for and during the term and period of

One Year and one day on each of counts 1-2-3-4-5-6-7-9-10-11-13-14-15-16-17-18-19-20. All sentences to run concurrently. Bail pending appeal continued.

(March 8th, 1938—defendant paroled in own recognizance pending appeal.)

Robert P. Patterson, U. S. D. J.

[fol. 2698] COMMITMENT

(Dr. Maximilian Goldstein)

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

The President of the United States of America:

To the Marshal of the United States for the Southern District of New York and to Warden of the U. S. Northeastern Pen. at Lewisburg, Penna.

Whereas the foregoing judgment and sentence was pronounced against the defendant named therein,

And, Whereas, the Attorney-General of the United States has designated the above named institution as the place of confinement where the said sentence shall be served,

Now, this is to command you, the said marshal, forthwith to take and safely transport to said institution and there deliver to the officer in charge thereof the aforesaid defendant together with a copy of this writ; and you the officer in charge of said institution to receive, keep and imprison said defendant in accordance with said sentence, or until said defendant shall be otherwise discharged by due course of law. If said prisoner shall have been committed to a jail or other place of detention to await transportation to the place at which said sentence is to be served, said sentence shall pursuant to law begin on the date on which said defendant was received at such jail or other place of detention.

Witness, the Hon. Robert P. Patterson, Judge of said Court and the seal thereof affixed at New York City in said district this 7th day of March, 1938.

Charles Weiser, Clerk. (Seal.)

[fol. 2699] IN UNITED STATES DISTRICT COURT

C 100—451

Present: Hon. Robert P. Patterson, Judge.

U. S. Criminal Code, Section- 88 and 338, Title 18 U. S. C.

Using the mails in a scheme to defraud and conspiracy so to do.

UNITED STATES OF AMERICA

vs.

MARTIN GROSS

JUDGMENT—March 7, 1938

(Martin Gross)

On motion of the United States Attorney, Ordered Sentence,

It is thereupon ordered and adjudged that the above named defendant be committed to the custody of the Attorney-General of the United States or his authorized representative, for imprisonment in a penitentiary for and during the term and period of

Three Years on each of counts 1-2-3-4-5-6-7-9-10-11-13-14-15-16-17-18-19. Two Years on count 20. All sentences to run concurrently. Bail continued pending appeal.

Robert P. Patterson, U. S. D. J.

[fol. 2700] COMMITMENT

(Martin Gross)

In the District Court of the United States of America, Southern District of New York:

The President of the United States of America:

To the Marshal of the United States for the Southern District of New York and to Warden of the U. S. Northeastern Pen. at Lewisburg, Penna.

Whereas the foregoing judgment and sentence was pronounced against the defendant named therein,

And, Whereas, the Attorney-General of the United States has designated the above named institution as the place of confinement where the said sentence shall be served.

Now, This Is To Command You, The Said Marshal, forthwith to take and safely transport to said institution and there deliver to the officer in charge thereof the aforesaid defendant together with a copy of this writ; and you the officer in charge of said institution to receive, keep and imprison said defendant in accordance with said sentence, or until said defendant shall be otherwise discharged by due course of law. If said prisoner shall have been committed to a jail or other place of detention to await transportation to the place at which said sentence is to be served, said sentence shall pursuant to law begin on the date on which said defendant was received at such jail or other place of detention.

Witness, the Hon. Robert P. Patterson, Judge of said Court and the seal thereof affixed at New York City in said district this 7th day of March, 1938.

Charles Weiser, Clerk. (Seal.)

[fol. 2701] IN UNITED STATES DISTRICT COURT

C 100-451

Present: Hon. Robert P. Patterson, Judge.

U. S. Criminal Code
Title 18 U. S. C.

UNITED STATES OF AMERICA

vs.

GEORGE KRUPP

JUDGMENT—March 7, 1938

(George Krupp)

On motion of the United States Attorney, Ordered Sentence,

It is thereupon ordered and adjudged that the above named defendant be committed to the custody of the Attorney-General of the United States or his authorized representative, for imprisonment in a penitentiary for and during the term and period of

One year and one day on each of counts 1-2-3-4-5-6-7-14-15-16-17-18-19-20. All sentences to run concurrently. Bail continued pending appeal.

Robert P. Patterson, U. S. D. J.

[fol. 2702] COMMITMENT

(George Krupp)

In the District Court of the United States of America, Southern District of New York:

The President of the United States of America:

To the Marshal of the United States for the Southern District of New York and to Warden of the U. S. Northeastern Pen. at Lewisburg, Penna.

Whereas the foregoing judgment and sentence was pronounced against the defendant named tehrein,

And, Whereas, the Attorney-General of the United States had designated the above named institution as the place of confinement where the said sentence shall be served.

Now, This Is To Command You, The Said Marshal, forthwith to take and safely transport to said institution and there deliver to the officer in charge thereof the aforesaid defendant together with a copy of this writ; and you the officer in charge of said institution to receive, keep and imprison said defendant in accordance with said sentence, or until said defendant shall be otherwise discharged by due course of law. If said prisoner shall have been committed to a jail or other place of detention to await transportation to the place at which said sentence is to be served, said sentence shall pursuant to law begin on the date on which said defendant was received at such jail or other place of detention.

Witness, the Hon. Robert P. Patterson, Judge of said Court and the seal thereof affixed at New York City in said district this 7th day of March, 1938.

Charles Weiser, Clerk. (Seal.)

[fol. 2703] In United States District Court, Southern District of New York

[Title omitted]

STIPULATION AND ORDER AS TO RECORD

It Is Hereby Stipulated And Agreed that the foregoing is a true copy of the transcript of the record in the case of United States of America v. Joseph J. Weiss, Dr. Maxi-

milian W. Goldstein, Dr. George Krupp and Martin Gross, as agreed upon by the parties.

Dated: New York, September 30, 1938.

Lamar Hardy, Attorney for Plaintiff Respondent. Lloyd P. Stryker, Attorney for Defendant Appellant, Joesph J. Weiss. Schwartz & Frohlich, Attorneys for Defendant, Maximilian Goldstein. Syl- [fol. 2704] van Schwartz, Attorney for Defendant, George Krupp. Jacob W. Friedman, Attorney for Defendant, Martin Gross.

ORDER

Upon the above stipulation it is

Ordered, that the foregoing typewritten record be filed in lieu of the original papers for the purpose of certifying the record on appeal.

Dated: New York, September 30, 1938.

Robert P. Patterson, U. S. D. J.

[fol. 2705] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

UNITED STATES, Plaintiff-Appellee,

v.

JOSEPH J. WEISS, ET AL., Defendants-Appellants

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS— August 19, 1938

A motion having been made herein by counsel for the appellants for leave to prosecute the appeal in *forma pauperis;*

Upon consideration thereof it is ordered that said motion be and hereby is granted,—three typewritten copies of the record and appellants' brief to be filed.

William Parkin, Clerk. By D. E. Roberts, Deputy clerk.

[fol. 2706] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 2706A] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT

[Title omitted]

STIPULATION AND ORDER EXTENDING TIME TO FILE TRANSCRIPT OF RECORD AND BILL OF EXCEPTIONS—Filed October 14, 1938

It is Hereby Stipulated by and between the attorneys for the respective parties hereto that the time to file the transcript of record and the bill of exceptions for all defendants-appellants herein is extended from the 1st day of October, 1938 to and including the 15th day of October, 1938.

Dated: New York, N. Y., September 30, 1938.

Lamar Hardy, United States Attorney; Lloyd Paul Stryker, Attorney for Joseph J. Weiss. Jacob W. Friedman, Attorney for Martin Gross; Sylvan Schwartz, Attorney for Dr. George Krupp; Schwartz and Frohlich, Attorneys for Dr. Maximilian Goldstein.

So ordered, Thomas W. Swan, U. S. C. J.

[File endorsement omitted]

[fol. 2707] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee,

against

JOSEPH J. WEISS, MARTIN GROSS, DR. GEORGE KRUPP AND DR. MAXIMILIAN GOLDSTEIN, Appellants,

and

DR. HIRSCH L. MESSMAN, BENJAMIN NELSON, HERMAN BERGER AND MORRIS SPITZ, Defendants

Before: Augustus N. Hand and Chase, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

At the trial of the above action, in which the defendants Weiss, Gross, Dr. Krupp and Dr. Goldstein were indicted

under 18 counts for the use of the mails in execution of a scheme to defraud and under one count for conspiracy, Weiss, Gross and Dr. Goldstein were convicted under all counts except 8 and 12, and Dr. Krupp was convicted under all counts except 8, 9, 10, 11, 12 and 13. From the judgment of conviction each defendant has appealed.

Affirmed.

[fol. 2708] Lloyd Paul Stryker, Attorney for appellant Weiss; Lloyd Paul Stryker and Harold Shapero, Counsel.

Schwartz & Frohlich, Attorneys for appellant, Dr. Goldstein; Theodore Kiendl and Arthur Schwartz, Counsel.

Sylvan Schwartz, Attorney and counsel for appellant Dr. Krupp.

Jacob W. Friedman, Attorney and counsel for appellant Gross.

Lamar Hardy, United States Attorney for the Southern District of New York, for appellee; John F. Dailey, Jr., and Irving R. Kaufman, Assistant United States Attorneys, counsel.

OPINION

Augustus N. Hand, Circuit Judge:

The appellants J. J. Weiss, Gross, Dr. Krupp and Dr. Goldstein were convicted under Title 18, Section 338, U. S. C., of the use of the mails in the execution of a scheme to defraud, and under Title 18, Section 88 U. S. C., of a conspiracy therefor. The scheme involved was to defraud insurance companies by filing false claims representing that the defendants Nelson, Berger and Spitz were permanently and totally disabled when in fact they were not. All three claimants pleaded guilty and testified for the government. Three doctors participated in the scheme, to wit, the defendants Messman, who testified for the government and pleaded guilty, and the defendants Goldstein and Krupp who stood trial. The other defendants who were indicted for the scheme were the defendants J. J. Weiss and A. L. Weiss, lawyers, and Martin Gross, their runner. Owing to illness the defendant A. L. Weiss obtained a severance during the course of the trial. Defendant J. J. Weiss stood trial and toward the end of the trial conceded that there was no doubt that the claims of defendants Spitz,

Berger and Nelson were fraudulent. The chief issue of fact [fol. 2709] for the jury was whether the defendants who stood trial and have taken an appeal, namely, Weiss, Gross, Dr. Krupp and Dr. Goldstein, participated in the filing of the false claims with guilty knowledge.

Before discussing the merits of the case, we shall deal with the evidence of telephone communications intercepted by means of socalled "wire tapping" by government agents. The appellants say that the admission of that evidence was an error sufficient in itself to call for the reversal of the judgment, irrespective of any other objection. They chiefly rely on the decision of the Supreme Court in Nardone v. United States, 302 U. S. 379, which was rendered on an appeal from this court. United States v. Nardone, 90 F. (2d) 630, (C. C. A. 2). There both interstate and intrastate telephone messages were intercepted through wire tapping and used as proof in a criminal trial. We held that under Section 605 of the Federal Communications Commission Act (U. S. C. Title 47, Chapter 5, § 605) interstate communications were not inadmissible and assumed that the act did not cover the intrastate messages. The Supreme Court reversed our decision on the ground that the use of interstate messages as evidence was essentially forbidden by the clause of § 605 supra which provides that: "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person".

In reaching the above conclusion it cannot be supposed that the Supreme Court was intending to deal with anything but the admissibility of interstate communications, for [fol. 2710] they were the only messages, the reception of which we had treated as open to doubt. Moreover, the context of the Federal Communications Act seems to limit the application of § 605 to interstate and foreign messages. As declared in the first section of the act (U. S. C. Title 47, § 151) the Communications Commission was created for the purpose "of regulating interstate and foreign commerce in communication by wire and radio". In the next section it was provided that:

"(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio * * *

"(b) Subject to the provisions of section 301, nothing in this chapter shall be construed to apply to or give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service of any carrier, * * *."

It is argued that because the clause of §605 on which the Supreme Court relied in Nardone v. United States, 302 U. S. 379, is general in its language prohibiting interception and disclosure of communications while the other clauses of §605 are in terms limited to "interstate or foreign communications" it embraces intrastate messages. This seems to us a forced construction which flies in the face of the first and second sections of the act that we have quoted. Moreover, the third clause of §605, which provides that "no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto" contains a limitation to in- [fol. 2711] terstate and foreign communications which is repugnant to the supposed unlimited prohibition of the second clause. It should also be noticed that the second clause of Section 605, which was relied on by the Supreme Court in Nardone v. United States, supra, prohibits intercepting and divulging or publishing the contents of intercepted messages. It cannot be maintained that intercepting alone is prohibited and that the clause relates to intrastate as well as to interstate and foreign messages because interception would affect both. Divulging one or the other can be readily dealt with separately and the section as a whole seems only to forbid divulging interstate or foreign messages. We, therefore, regard the decision of the First Circuit in Valli v. United States, 94 F. (2d) 687, rather than that of the Sixth Circuit in Diamond v. United States, 94 F. (2d) 1012, or of the Third Circuit in Sablowsky v. United States of America, 101 F. (2d) 183, as properly interpreting § 605. We realize that in United States v. Olmstead, 277 U. S. 438, three of the minority took the view that wire tapping in violation of a state penal statute was so contrary to good morals that messages thus obtained ought not to be admitted in evidence in a United States court, and that Justices Brandeis, Butler and Stone said that the

messages were obtained in violation of the Fourth Amendment of the Constitution and their admission under objection was a violation of the Fifth Amendment. In the present case, however, no law of New York prohibited obtaining messages by wire tapping. Messages thus obtained are admissible in the New York courts and the government in using them was not accepting the fruits of a crime as in United States v. Olmstead, 277 U. S. 438. We are bound by the decision of the majority in the latter case and are im- [fol. 2712] pressed by the omission of the Supreme Court to say that Section 605 is broad enough to include intercepted intrastate messages though it relied on that section to support its decision in United States v. Nardone, 302 U. S. 379, that intercepted interstate messages were improperly admitted in evidence. In spite of some hesitation because of the decisions in Sablowsky v. United States, 101 F. (2d) 183, and Diamond v. United States, 94 F. (2d) 1012, and of the dissenting opinion of Judge Morton in Valli v. United States, 94 F. (2d) 687, we hold that there was no error in admitting the proof derived through wire tapping.

The point is made that one of the communications obtained through wire tapping and admitted in evidence (Exhibit 307) was an interstate call. That conversation was between Weiss in New York and Gross whose definite whereabouts was not shown. But Gross once testified that he was in the traffic court at the time he called up Weiss. He afterwards said that he did not remember where he was. In the transcript of the conversation he, however, said to Weiss: "I'll be down in a few minutes." It is hard to believe he would have said this if he had been outside the state. We think there was enough to justify the trial judge in holding that Gross was within the state at the time and that the communication was intra-state. It is argued that, even if the conversations obtained through wire tapping were erroneously admitted, the error was not prejudicial because the factum of the conversations was conceded by the defendants affected. This argument is not convincing.

It may be said with some plausibility that the defendant Goldstein was not prejudiced since he was neither a party to, nor mentioned in the conversations obtained through [fol. 2713] wire tapping. These conversations, however, showed that Goldstein's co-defendants were engaged in a conspiracy which other proof indicated that he joined. They also gave credence to the testimony of Messman. Such

evidence weighed against Goldstein and his conviction ought not to stand if the communications implicating the others were improperly received. As regards the defendant Krupp, he seems to have admitted the conversations in which he was concerned. But it cannot be said that evidence which he was compelled to explain and justify was not legally prejudicial if improperly admitted under his objection. The defendant Gross denied some of the conversations relating to him which were obtained through wire tapping. He was prejudiced by Exhibit 142 containing an alleged conversation between himself and Nelson as to one Blumberg which he testified in fact referred to a person he only knew as Bromberg and not as Blumberg. Another alleged conversation between Gross and Weiss contained in Exhibit 307 and relating to fees to be charged by Weiss to one Spitz was not admitted by Gross and was highly prejudicial as tending to support the government's contention that Gross was a "runner" for Weiss. But even where the conversations were not denied or were conceded he was legally prejudiced by having to explain and justify evidence which he had challenged at the outset, unless it was properly admitted. The defendant Weiss is in the same position and his conviction can only stand if we are right in holding that the communications derived through wire tapping were competent evidence. Weiss, who was a party to conversations obtained through thirty-four wire taps was prejudiced by their admission unless they were lawfully received in evidence.

[fol. 2714] There can be no doubt that the government offered sufficient proof to go to the jury on all the evidence submitted.

It is not questioned that Messman, Spitz, Berger and Nelson were engaged in committing frauds upon insurance companies through the filing of false claims representing that Nelson, Berger and Spitz were disabled when in fact they were not. There likewise can be no doubt that each of the appellants assisted in promoting at least some of the claims against the insurance companies. The defendant Weiss assisted in all three cases, as did Gross. The defendant Krupp gave a medical certificate in the Spitz case, the defendant Goldstein gave a certificate in the Nelson case.

The trial judge directed the attention of the jury to the evidence showing conscious fraud on the part of the appel-

lants. In respect to the proof against the defendants Weiss and Gross he charged the jury that the testimony was to the general effect that Gross suggested the idea of creating false claims and asserted that he could put claimants in touch with a doctor who would tell them how to feign disease and deceive a company, and with lawyers who would direct the legal steps. The judge charged that there was testimony that Gross took the claimants to Messman,

"who prepared fictitious histories for them, told them what pains to complain of, in the cases of Nelson and Berger gave them pills, digitalis or urgininé, which would affect the electro-cardiogram or e k g that might be taken of them, and arranged to send them to hospitals, for which services Messman testified he was to receive substantial fees out of the moneys expected to be realized."

[fol. 2715] The Judge went on to say:

"Nelson and Berger testified that for some days before medical examinations they would take these pills, although neither of them liked them, and Nelson I believe testified they made him nauseous. These witnesses testified separately that they were brought separately to Weiss by Gross or Nelson or Messman and that Weiss passed upon papers they sent out; gave general directions; in the case of Spitz financed some of the hospital expenses and premium expenses; and Nelson and Berger testified that they were told to prepare for examination by Weiss. If the testimony of each of these four witnesses, or any one of them, is true in the main, then Gross and Weiss were active participants in the scheme and had guilty knowledge of the fact that the claims were fraudulent.

"There is testimony that in the Spitz case no directions were needed to be given and he did not take any drugs; and there is testimony that in the Spitz case a quarrel developed as to the size of the fee which the lawyers should have, which resulted in the lawyers eventually not taking up, or dropping, the Spitz case.

"Mrs. Berger was also a witness and she testified relative to the defendant Gross. According to her testimony she wanted Berger to get out of it. She was visited by the defendant Gross, so she said, that he came around and told her that she should not worry, that there was good money in it, the companies could afford to pay, and that people richer than she and Berger were doing it.

* * * * * * *

"As to the defendant Goldstein he is charged with having assisted in the Nelson claim, knowingly assisted in the Nelson claim, and the witnesses as to that phase of the case [fol. 2716] are Messman and Nelson. Spitz and Berger had no testimony to offer in that connection.

"Messman testified in substance that when he brought Nelson to be examined by Goldstein on December 19, 1934, he told Goldstein that he had been giving digitalis to Nelson, and, in substance, that it was a fake case. He testified that an e k g was taken on that day, which Goldstein told him later was 'not so hot'. He testified further that he later induced the defendant Goldstein to antedate an e k g, which he said was taken on July 15th, to antedate it to an earlier date, June 17th.

"The government claims that several papers around the summer of 1935 tend to bear out the testimony of Messman relative to the date when the e k g was actually taken. Nelson testified that an e k g was taken on December 19, 1934, and he testified that certain dates given in certificates signed by Goldstein were false; that he was not visited or treated by Goldstein on those dates.

"As to the defendant Krupp he is charged with having assisted only in the Spitz case. The testimony of Messman, Nelson and Spitz, not Berger, is to the effect that Krupp acted as Spitz's family doctor and pretended to have treated Spitz for heart attacks for a promised fee of $750. The testimony of Berger, except as to one meeting I believe, has nothing to do with the defendant Krupp."

While motions were made at the close of the case for the direction of a verdict for the defendants, there seems to have been no question about the correct summary by the Judge of the testimony against them. The errors, if any, which might lead to a reversal must depend upon the propriety of admitting conversations recorded through wire [fol. 2717] tapping, which we have already sustained, and the validity and importance of other objections, taken during the course of the trial, which are referred to hereafter.

It is argued on behalf of the defendant Goldstein that he was not shown to have been connected with any general conspiracy to defraud insurance companies but only with a specific plan of fraudulently obtaining disability payments for the defendant Nelson from a single insurance company. This, we think, is an unnecessary limitation of the inferences

which may be drawn against Goldstein. While there was no proof that Goldstein knew of the Spitz or Berger claims nevertheless Goldstein, in dealing with Nelson and Messman, showed such a familiarity with the sort of fraud involved in the indictment that a jury might well infer that he had become a participant in a general conspiracy on the part of Messman, Weiss, Nelson and others to defraud insurance companies. The following is part of the conversation between Messman and Goldstein as to the Nelson claim. Messman testified thus:

"This fellow outside, his name is Nelson. He is going to be a disability case. * * * I said to him, 'You remember the Weisses are quite liberal with payments to doctors, not like the Garrows', and Goldstein said, 'As far as the Garrows are concerned, we started them with a small fee, it is just too bad, it is pretty hard to get away from a small fee.' I said, 'Don't worry about this fellow here. We will get a nice fee now.' And later I said, 'You will get a still better fee from the Weisses directly.' He said, 'What are you going to claim?' I said, 'It is a heart case, not a t. b. case.' I said, 'The reason I brought him here is that I expect to take him to the hospital, and what is on my mind I want [fol. 2718] you to take his electrocardiogram to see if he is ready to go to the hospital, because I have given him digitalis in the past four or five days.' He said, 'How much digitalis did you give him?' And I said, 'Two tablets three times a day.' He figured out aloud how many tablets that would make, and he said, 'He is ready, probably ready, but' he said, 'you know I do not develop electrocardiograms here in my office, I develop them at the Sydenham Hospital.' I said, 'How will I know whether Nelson is ready or not?' He said, 'The situation is this. Apparently he is ready if he took what you say he has taken. Assume that the electrocardiogram I am going to take right away is not positive enough, then will he stay in the hospital, take another few tablets and then I will take another electrocardiogram in the hospital anyway, because that is part of the buildup.''

Moreover there was evidence that Goldstein had worked with Messman on the Hochberg case, that Hochberg was at the Sydenham Hospital and Goldstein extracted an electrocardiograph and tore it up. Though Goldstein denied that he tore up the test he failed to explain on cross-examination why one copy was not part of the hospital records as it

should have been. We think there was sufficient proof of a conspiracy to defraud insurance companies in which all defendants were engaged to support the jury's verdict. United States v. Graham (as yet unreported), Jarvis v. United States, 90 F. (2d) 243, 245, 246, (CCA.1), (Cert. denied 302 U. S. 705): Coates v. United States, 59 F. (2d) 173, 174, (CCA. 9).

[fol. 2719] The point is also made that Goldstein dropped out of the conspiracy after he gave the disability certificate in the Nelson case on September 23, 1935. But there not only was testimony by Messman that Goldstein was promised "further remuneration when the case was surrendered" (record p. 1005) but proof is lacking that he took any affirmative steps to withdraw from the conspiracy. Hyde v. United States, 225 U. S. 347; United States v. Graham, supra; United States v. Dubrin, 93 F. (2d) 499, 504. Accordingly the jury might find, as it did, that he was still in the conspiracy at the times of the mailing of the socalled "indictment" letters which were subsequent to September 23, 1935. But the mailing of the letter on June 21, 1935, charged in Count 9, occurred while Goldstein clearly was a party to a scheme to defraud insurance companies, so that, even though the proof showed Goldstein to be a participant in a limited conspiracy with Messman, Nelson and Weiss, instead of a conspiracy, as we hold, with all defendants, his conviction on Count 9 and on the conspiracy count could still be affirmed, in view of the charge of the court and the evidence, without prejudicing any substantial right which he could claim. See Berger v. United States, 295 U. S. 78.

The contention of the defendants that the judgment of conviction should be reversed because of errors due to alleged improper cross-examination needs little comment.

With respect to Weiss, his statement on direct that he had never had anything to do with a false claim left him open to a very broad cross-examination the proper bounds of which so far as they may have been occasionally exceeded were sufficiently cured by the admonitions of the court.

[fol. 2720] With respect to Gross, some of the questions asked, e. g., about the activities of his former associate Ellentuch and about the alleged confession of Schwartz (for whom Gross had filled out insurance forms) that Schwartz's claim was fraudulent and that Gross had suggested it, were improper. Indeed, the latter question was ruled out. The

same thing is true of certain other questions by counsel for the government which assumed facts without sufficient basis in the record. Some of these were excluded by the trial judge, who repeatedly cautioned the jury against taking assumed facts in place of proof. For example, at page 2092 of the record, he said:

"The jury have been told several times that they are not to assume the facts or to take the facts as proof, just because they are assumed in counsel's questions."

He also charged the jury (page 2595):

"Your verdict should be based upon the evidence alone, and not upon statements or charges that have been made that have no support in the evidence. By evidence I mean the exhibits marked in evidence and the oral testimony of the witnesses that were sworn."

It seems to us that there was such ample proof of guilt on the part of Gross that any excess zeal in the manner of cross-examination could not have affected the result.

With respect to Krupp, criticism is made of the cross-examination about a judgment by default, obtained against him by one of his patients, and apparently based upon charges of negligence. We do not think this item of evi- [fol. 2721] dence could have affected the result in view of the answers, but in any event regard its admission as a matter for the discretion of the trial judge.

With respect to Goldstein, complaint is likewise made of the extent of the cross-examination. In view of his own testimony on direct with reference to other disability cases, and his cross-examination of Messman as to the Hochberg case, we think the cross-examination was justified.

Some of the statements of the United States attorney in his summation are subject to criticism, but we cannot regard them as affecting the result or as anything like the damaging statements involved in Berger v. United States, 295 U. S. 78.

We have considered the other objections raised with respect to the conduct of the trial and find nothing calling for a reversal of the judgment of conviction.

Judgment affirmed.

Note: Judge Manton sat at the argument of this appeal but resigned before the opinion was written.

[fol. 2722] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

Present: Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

UNITED STATES, Plaintiff-Appellee,

vs.

JOSEPH J. WEISS, et al., Defendants-Appellants,

DR. HIRSCH L. MESSMAN, et al., Defendants.

JUDGMENT—filed April 13, 1939

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 2723] [File endorsement omitted.]

[fol. 2724] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 2725] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 5, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, limited to the question whether the trial court properly received in evidence intercepted telephone communications.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 2726] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING OF RECORD FOR USE OF WRIT OF CERTIORARI—Filed August 11, 1939

In view of the fact that this Court in granting a writ of certiorari in the above entitled cause limited its review to the question "whether the trial court properly received in evidence intercepted telephone communications," it will be unnecessary to a consideration of such question to print a substantial portion of the certified typewritten transcript of record filed in this Court in connection with the petition for writ of certiorari. It is therefore hereby stipulated by and between counsel for the parties to the above entitled cause that the Clerk shall be required to print only the following portions of such transcript:

I. Indictment and Docket Entries (Volume I of Record on Appeal).

(1) Page 4 to and including page 30.
(2) Page 34 to and including page 40.

II. Bill of Exceptions

(1) Volume I of Record on Appeal.

(a) Page 65.

(b) Page 112 down to and including the words "have pleaded guilty," with the exception of the sentence beginning with the words "I am 42 years of age."

[fol. 2727] (c) Page 215 beginning with the words "Mr. Kaufman: I ask that this be marked for identification" down to and including the words " 'Mrs. Messman: Yeah'." on page 229, but excluding the paragraph beginning with the words "Mr. Kaufman: Government's Exhibit 111" etc. on page 229.

(d) Page 270 beginning with the words "Mr. Kaufman: Your Honor, at this point" etc., down to and including the words "(Mr. Kaufman read Government's exhibits 123, 123a and 123b to the jury.)" on page 288, with the exception of two paragraphs on page 287, the first beginning with the words "I think I went to Mirchin's" and the second beginning with the words "I believe I saw Mr. Gross."

(e) Page 290 beginning with the words "Government's Exhibits 123 [124] and 124a" down to and including the

words "(Mr. Kaufman read Government's Exhibit 124a to the Jury.)".

(f) Page 296 beginning with the words "On Government's Exhibit 128" etc. down to and including the words "(Government's Exhibit 133a read to the jury.)" on page 299.

(g) Page 560 to and including page 590.

(2) Volume III of Record on Appeal.

(a) Page 2033, the first two lines.

(b) Page 2068, the words "Cross examination by Mr. Dailey".

(c) Page 2605 beginning with the words "Mr. Stryker:" down to and including the words "verdict in a conspiracy case ——".

(d) Page 2616 to and including page 2619.

III. Notices of Appeal, Assignments of Error, Judgments, etc.

(1) Volume III of Record on Appeal.

(a) Page 2620 to page 2621 down to and including the paragraph numbered "2".

(b) Page 2626 down to and including the words "to his prejudice, to wit:".

(c) Page 2650 beginning with the words "(20) The District Court erred" down to and including the words "'crux of this case * * *.'" on page 2653.

(d) Page 2655, the last two lines.

(e) Page 2657 down to and including the words "grounds of appeal" on page 2658.

(f) Page 2659 beginning with the words "10. The Court erred in admitting" etc. down to and including the paragraph numbered "11" on page 2660.

(g) Page 2661 down to and including the words "were taken, to wit:"

[fol. 2728] (h) Page 2667 down to and including the words "before the jury" on page 2668, except the paragraph numbered "(s)" on page 2667.

(i) Page 2672.

(j) Page 2673 down to and including the paragraph numbered "3" on page 2674.

(k) Page 2676 down to and including the paragraph numbered "(2)".

(l) Page 2677 beginning with the words "Wherefore" to the end of the page.

(m) Page 2678 down to and including the paragraph numbered "Fourth" on page 2679.

(n) Page 2682 down to and including the words "to which exceptions were taken, to wit:"

(o) Page 2687 beginning with the words "(q) the District Court erred" down to and including the end of page 2688 with the exception of the paragraph numbered "(s)".

(p) Page 2691.

(q) Page 2692 to and including page 2706.

(2) Volume IV of Record on Appeal.

(a) Page 2706A.

IV. Proceedings in Circuit Court of Appeals including Opinion, Judgment, etc. of that court.

It is further stipulated that 76 intercepted telephone communications were received in evidence; that both parties to 38 of these communications testified for the Government; that one of the two parties to 37 of the communications testified for the Government; that with respect to all of the communications which were introduced in evidence (except Government's Exhibit 307) each communication was admitted only after it had been identified by at least one of the parties thereto and that the parties identifying these communications were four of the defendants, three of whom had previously pleaded guilty to the indictment; and that the same procedure which was followed in introducing the communications referred to in the portions [fol. 2729] of the typewritten transcript of record herein stipulated to be printed, was followed in respect to the remainder of the 76 communications, i.e. each communication was introduced by reading to the jury a stenographic transcript thereof or by playing in open court a recording of the communication, or by both methods, and when a recording of a communication was played stenographic transcripts thereof were handed to each juror, or to every other juror, so that they could follow the recording while it was being played.

It is further stipulated that interstate telephone communications were transmitted over the same wire which was used in transmitting the intercepted intrastate telephone communications which were received in evidence.

It is further stipulated that each of the parties to the above entitled cause shall have the right to refer in his or its briefs and oral argument to any portions of the typewritten transcript of record filed in this Court on petition for writ of certiorari which are not contained in the record as printed pursuant to this stipulation, in the same manner as if the typewritten transcript had been printed in full.

Lloyd Paul Stryker, Counsel for Petitioner Joseph J. Weiss; Jacob W. Friedman, Counsel for Petitioner Martin Gross; Sylvan Schwartz, Counsel for Petitioner Dr. George Krupp; Theodore Kiendl, Counsel for Petitioner Dr. Maxmilian Goldstein; Edward Bell, Acting Solicitor General.

August 8, 1939.

[fol. 2730] [File endorsement omitted.]

[Endorsed:] File No. 43,424, U. S. Circuit Court of Appeals, Second Circuit, Term No. 42. Joseph J. Weiss, Martin Gross, Dr. George Krupp and Dr. Maximilian Goldstein, Petitioners, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed May 6, 1939. Term No. 42. O. T. 1939.

FILE COPY

No. 9[redacted] 42

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IN THE

Supreme Court of the United States

OCTOBER TERM—1938

JOSEPH J. WEISS, MARTIN GROSS, DR. GEORGE KRUPP and DR. MAXIMILIAN GOLDSTEIN,

Petitioners,

—*against*—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1938

JOSEPH J. WEISS, MARTIN GROSS, DR. GEORGE KRUPP and DR. MAXIMILIAN GOLDSTEIN,

Petitioners,

—*against*—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners Joseph J. Weiss, Martin Gross, Dr. George Krupp and Dr. Maximilian Goldstein respectfully pray for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court entered on April 13, 1939, affirming a judgment of the District Court of the United States for the Southern District of New York, entered on March 7, 1938, convicting the petitioners of the crimes of using the mails to defraud, in violation of 28 U. S. C., Section 338; U. S. C. C., Section 215, and of conspiracy to commit an offense against the United States, to wit, to use the mails to defraud, in violation of 18 U. S. C., Section 88.

Statement of Matters Involved.

Petitioners, with others, were indicted on twenty counts, nineteen of which charged petitioners with using the mails pursuant to an alleged scheme to defraud life insurance companies by inducing them to pay false claims for disability, health and accident benefits under insurance policies. The twentieth count charged petitioners with conspiracy so to do. Petitioners Weiss, Goldstein and Gross were convicted on all counts except counts numbered "8" and "12". Petitioner Krupp was convicted on all counts except counts numbered "8", "9", "10", "11", "12" and "13".

The alleged conspiracy and scheme to defraud, charged in the indictment, covered a period from January 15, 1934 to and including the date of the filing of the indictment on July 30, 1937.

I.

The Government, in order to prove its case, introduced, over petitioners' objection and exception, evidence of seventy-five intrastate telephone communications which had been intercepted by means of "tapping" telephone wires (R. 2729-33). The contents of three other such intercepted intrastate communications were not placed in evidence, but were put before the jury in the form of questions of the prosecutor (R. 2000, 2003, 1965-9, 1908-25). Evidence as to one intercepted telephone communication was introduced without proof as to whether the communication was intrastate or interstate.

The work of intercepting and recording these communications had been carried out, in the City and State of New York, by a private detective agency—paid by insurance companies, which agency acted throughout under the direct supervision and control of agents of the United States (R.

586). The telephone wires thus "tapped" were those of the office of the petitioner Weiss, located in the City of New York, and that of the defendant Messman (who testified for the Government) also located in the City of New York. Every call coming to or going from the Weiss office was intercepted and recorded (R. 580) regardless of whether the call was intrastate or interstate (R. 1825-8).

Such "wire-tapping" is a criminal offense under the laws of the State of New York: New York, Consolidated Laws [Penal Law], Chapter 40, Section 1423 (6).[1]

The phonographic discs upon which these conversations were recorded by the intercepters were placed in evidence and many of them were played in open court upon a phonograph. In addition, stenographic transcripts of the conversations were admitted in evidence over objection and exception, and read to the jury.

This evidence, according to the statement of the United States Attorney in his summation, constituted the "crux" of the prosecution's case (R. 2575). The Court below recognized this to be the fact and recognized that the admission of this evidence prejudiced all of the petitioners.

The Court below stated (Opinion p. 7):

> "Such evidence weighed against Goldstein and his conviction ought not to stand if the communications implicating the others were improperly received."

The Court below also stated (Opinion p. 7):

> "The defendant Weiss is in the same position and his conviction can only stand if we are right in holding

1. The Court below erroneously stated in its opinion that "no law of New York prohibited obtaining messages by wiretapping" (Opinion p. 5). See *Olmstead* v. *U. S.*, 277 U. S. 438, 479.

that the communications derived through wire tapping were competent evidence. Weiss, who was a party to conversations obtained through thirty-four wire taps was prejudiced by their admission unless they were lawfully received in evidence."

The Court also held that the petitioners Gross and Krupp were legally prejudiced unless the intercepted communications were properly admitted (Opinion p. 7).

II.

The summation of the United States Attorney exceeded the latitude permitted by the applicable decisions of this Court. He told the jury that the exhibits in the case were only "a fraction" of those in his possession (R. 2573). He stated in substance that the grand jury which had returned this indictment had accepted the testimony of the same persons who appeared at the trial as Government witnesses (R. 2572-73). He discussed his personal opinion of the guilt of the defendants and told the jury that prior to the trial, in the preparation of the case, he had become convinced of their guilt (R. 2573). He appealed to the pecuniary interests of the jurors as policy holders in insurance companies by stating that when insurance companies paid disability claims "the dividends go down and your premiums go up" (R. 2576). He stated that if the jury convicted the defendants, there would be a "one thousand per cent. dividend to the policy holders of America" (R. 2580). He attempted to justify certain aspects of the evidence by informing the jury of private conversations which he had had out of court with his own assistants (R. 2577). He appealed to the jurors on the ground that "the Government looks to you for your assistance in the suppression of crime" (R. 2582-83).

The Court below, in its opinion, stated that "some of the statements of the United States Attorney in his summation are subject to criticism" (Opinion p. 15). Nevertheless, the Court held that such statements did not affect the result and were not sufficiently damaging to come within the rule laid down by this Court in *Berger* v. *United States*, 295 U. S. 78.

III.

The petitioner Weiss, who had been a member of the Bar of the State of New York, took the stand and was cross-examined by the prosecutor. Under the guise of cross-examination the prosecutor was permitted to repeatedly read into his questions purported excerpts from documents not in evidence, to assume prejudicial statements of facts not borne out by the record and to suggest that statements had been made to him out of court in respect to which no proof was offered.

The prosecutor cross-examined the petitioner Weiss concerning a law suit instituted by one Gorowitz former client of the petitioner, through an attorney Males against Gorowitz's previous attorney one Lehr to compel the return of $5,000. In his cross-examination, the prosecutor read from affidavits in that proceeding which were made by Lehr, Gorowitz and one Blumenstein (R. 1895, 1985-6). These affidavits contained charges and counter charges of bribery, corruption, blackmail and extortion made by Gorowitz, Lehr and Blumenstein concerning one another.

To impeach the petitioner Weiss, the cross-examiner called his attention to one Max Blumberg (R. 1899, 1907) and when the defendant denied that he had induced clients to sell their insurance to companies by telling them they could arrange to get new insurance the prosecutor, despite the denial, then stated that Blumberg had told him in his office the con-

trary (R. 1906-7). There is no evidence in the record as to what Blumberg actually said.

Despite the petitioner's denial that he had represented to one Steuer that he was in a position to guarantee the payment of a claim that could not succeed in court (R. 1885-6), the prosecutor was nevertheless permitted to constantly repeat his questions.

During the course of his cross-examination of the petitioner Weiss, the prosecutor implied that many of the petitioner's friends were in trouble (R. 1974), and in reply to an answer of the petitioner Weiss stated that he had seen those that were indicted.

In cross-examining the petitioner concerning an alleged talk with a lawyer (R. 1966), the prosecutor incorporated in his questions quotations from a document (Ex. 385 for Id.) which was not in evidence, a document which purported to be a wire recording of the conversation. The prosecutor, despite the petitioner's denials that he was concerned in or suggested a bribery, was permitted to suggest and imply that the defendant had (R. 1966-9).

The petitioner Gross respectfully submits that his cross-examination on collateral matters was likewise highly improper and prejudicial.

With respect to this cross-examination, the Court below stated that in so far as the proper bounds "may have been occasionally exceeded", any error was "sufficiently cured by the admonitions of the court" (Opinion p. 13).

IV.

The petitioner Weiss called as character witnesses one Leonard Gardner, one time associate counsel for the Metropolitan Life Insurance Company (R. 1764-8), Emanuel W. Levine, former chairman of the Grievance Committee of the

Nassau County Bar Association, and others. They testified to his good reputation for integrity, fair and honest dealing.

Upon cross-examination, Gardner over objection and exception, which was coupled with a motion for a mistrial, which was denied, the United States Attorney was permitted, despite the witness' statement that he had not heard that an application had been made by the petitioner for life insurance (R. 1765), to ask:

> "If you heard that J. J. Weiss made an application for insurance, and that it was investigated by the Hooper-Holmes Agency* and that the report showed, in substance, that J. J. Weiss was considered to be a shyster and the ambulance-chasing type of attorney, shrewd and tricky in his dealings, and will bear watching in any dealings with him—I ask you if that would change or alter your opinion as expressed in your testimony a few moments ago as to his character?
>
> A. Not if I had just heard it. I do not go on what I hear. I would want to know who made that report." (R. 1765-6).

The record is bare of any proof that an investigation had been made as the prosecutor stated or that a report had been made as the United States Attorney stated in his question.

The petitioner Gross respectfully submits that his character witnesses were likewise improperly cross-examined.

V.

The evidence showed that the defendant Messman, who testified for the Government, had been paid a weekly salary by the Government, first in the amount of $65 per week and

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* An investigating service for insurance companies (R. 1765).

later in the amount of $100, totalling $3,227.12 from the date of his arrest to the date of trial (R. 814). The defendant Nelson, who also testified for the Government, similarly was paid a weekly salary of $50 by the Government, totalling $1,755. from the date of his arrest until the date of trial (R. 365-6). The defendant Spitz, who also testified for the Government, received after his arrest $1,700. from one of the insurance companies as consideration for the cancellation of his policy which at the time had a cash surrender value of only $878.40 (Ex. 261). The defendant Berger, who also testified for the Government, received $50 per week from an unidentified source (R. 1570).

The petitioner Weiss requested the trial court to charge that the fees to be paid witnesses are paid by government statute and requested the Court to charge in the language of the statute, U. S. C. Title 28, Section 601, Judicial Code and Judiciary. This request was refused by the trial court, which refusal has been assigned as error (R. 2653).

VI.

The District Court, the petitioner Gross respectfully submits, erroneously denied his application for the return of certain papers and documents illegally seized and for the suppression of such evidence. The denial of his application seriously prejudiced his rights at the trial.

Jurisdiction.

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on April 13, 1939. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, U. S. C. Title 28, Section 347.

Questions Presented.

I.

Was it error to admit, over petitioners' objection and exception, evidence of intrastate telephone communications intercepted, in violation of the Penal Law of the State of New York, by persons acting under the direction of agents of the United States, by tapping telephone wires which were conduits of both intrastate and interstate communication?

(a) Is such evidence rendered inadmissible by Section 605 of the Federal Communications Act? (Ch. 652, 48 Stat. 1064, 1103; U. S. C. Title 47, Section 605.)

(b) Apart from the Federal Communications Act, is such evidence rendered inadmissible by the Fourth and Fifth Amendments to the Constitution of the United States?

(c) Apart from the Federal Communications Act and the Fourth and Fifth Amendments, is such evidence rendered inadmissible by the fact that it was obtained by the criminal act of agents of the United States in violation of state law?

II.

Was it error to admit over petitioners' objection and exception, evidence of a telephone conversation intercepted, in violation of the Penal Law of the State of New York, by persons acting under the direction of agents of the United States, by tapping telephone wires which were conduits of intrastate and interstate communication, without proof as to whether the said conversation was an intrastate or interstate communication?

III.

Was the summation of the United States Attorney so improper and prejudicial as to constitute a denial of the petitioners' right to a fair trial, within the rule laid down in this Court in *Berger* v. *United States*, 295 U. S. 78?

IV.

Did the Court in permitting the prosecutor to read to the jury, in the form of questions, purported excerpts from documents not in evidence, to assume prejudicial statements of fact not borne out by the record and to suggest that statements prejudicial to the petitioners had been made to the prosecutor out of court, in respect to which no proof was offered, deny to petitioners Weiss and Gross their fundamental right of confrontation and cross-examination?

V.

Was it error and a deprivation of the petitioners' right to a fair trial and his fundamental rights of confrontation and cross-examination to have permitted the prosecutor to cross-examine character witnesses concerning a highly prejudicial report alleged but not proven to have been made, which the witnesses heard for the first time in questions put to them on cross-examination?

VI.

Was it error for the Court to refuse to charge, as requested, with respect to the fees which may be paid a witness by the Government pursuant to the applicable Federal statute?

VII.

Did the District Court err in denying the application of the petitioner Gross for the return of certain papers and

documents illegally seized and for the suppression of such evidence?

Statutes Involved.

Section 605 of the Federal Communications Act (Ch. 652, 48 Stat. 1064, 1103; U. S. C. Title 47, Section 605) provides as follows:

> "§605. *Unauthorized publication or use of communications.*
>
> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having be-

come acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, c. 652, §605, 48 Stat. 1103.)"

Reasons for Allowance of Writ.

1. The decision of the Court below, holding admissible evidence of intercepted intrastate telephone conversations, is in conflict with the decisions of other Circuit Courts of Appeals on the same matter.

Such evidence has been held inadmissible by the Circuit Court of Appeals for the Third Circuit in *Sablowsky* v. *United States*, 101 F. (2d) 183, (1938), and by the Circuit Court of Appeals for the Sixth Circuit in *Diamond* v. *United States*, 94 F. (2d) 1012.[1]

Such evidence was held admissible by the Circuit Court of Appeals for the First Circuit, by a divided Court, in *Valli* v. *United States*, 94 F. (2d) 687.[2]

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1. See also the *per curiam* opinion in *Diamond* v. *United States*, *supra*, denying the Government's petition for a rehearing. This opinion filed on April 11, 1938 and not officially reported, is appended to the brief in support of this petition.

2. In *Valli* v. *United States*, 94 F. (2d) 687, this Court granted a writ of certiorari (58 Sup. Ct. 760). Thereafter, further proceedings were abandoned by the petitioner and the cause was never brought on for argument in this Court.

The Court below stated in its opinion that in view of these conflicting decisions, it reached its conclusions with "some hesitation" (Opinion p. 6).

2. The decision of the Court below, holding such evidence admissible, is a decision upon an important question of Federal law which has not been, but should be, settled by this Court.

3. The decision of the Court below, holding admissible evidence of an intercepted telephone conversation without proof as to whether such conversation was intrastate or interstate, is a decision upon a Federal question in a way probably in conflict with the applicable decisions of this Court (*Nardone* v. *United States*, 302 U. S. 379, 1937).

4. The decision of the Court below, holding that the summation was not prejudicial, is a decision upon a Federal question in a way probably in conflict with the applicable decisions of this Court (*Berger* v. *United States*, 295 U. S. 78).

5. The decision of the Court below, in holding that the summation was not prejudicial error, so far sanctions a departure by the lower Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

6. The decision of the Court below holding that the cross-examination of petitioners Weiss and Gross was not prejudicial error is a decision upon a Federal question in a way probably in conflict with the applicable decisions of this Court (*Berger* v. *United States*, 295 U. S. 78).

7. The decision of the Court below holding that the cross-examination of the petitioner Weiss was not prejudicial so far sanctions a departure by the lower Court from the accepted

and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

8. The decision of the Court below in upholding the refusal of the trial court to charge with respect to the fees paid by the Government to witnesses so far sanctions a departure by the lower Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, your petitioners pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed, and that petitioners be granted such other and further relief as may seem proper.

Dated, New York, N. Y., May 5, 1939.

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Counsel for Petitioner Dr. George Krupp.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM—1938

JOSEPH J. WEISS, MARTIN GROSS, DR. GEORGE KRUPP and DR. MAXIMILIAN GOLDSTEIN,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit has not yet been officially reported. It is annexed to the certified transcript of the record heretofore filed herein.

No opinion was rendered by the United States District Court for the Southern District of New York.

Jurisdiction.

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on April 13th, 1939. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended, U. S. C. Title 28, Section 347.

Statement of the Case.

A summary statement of the case is set forth in the petition. A summary of the argument is set forth in the index.

Specification of Assigned Errors To Be Urged.

It is intended to urge all the errors assigned (R. 2626-2691), including the following:

1. It was error to admit, over petitioners' objection and exception, evidence of intrastate telephone communications intercepted, in violation of the Penal Law of the State of New York, by persons acting under the direction of agents of the United States, by tapping telephone wires which were conduits of both intrastate and interstate communication.

2. It was error to admit, over petitioners' objection and exception, evidence of a telephone conversation intercepted, in violation of the Penal Law of the State of New York, by persons acting under the direction of agents of the United States, by tapping telephone wires which were conduits of intrastate and interstate communication, without proof as to whether the said conversation was an intrastate or interstate communication.

3. It was error to permit the United States Attorney to make an improper and prejudicial summation.

4. It was error to permit the prosecutor to read to the jury, in the form of questions, purported excerpts from documents not in evidence, to assume prejudicial statements of fact not borne out by the record and to suggest that statements prejudicial to the petitioners had been made to the prosecutor out of Court, in respect to which no proof was offered.

5. It was error to permit the prosecutor to cross-examine character witnesses concerning highly prejudicial documents alleged but not proven to exist.

6. It was error for the Court to refuse to charge as requested with respect to the fees which may be paid a witness by the Government, pursuant to the applicable Federal statute.

7. It was error to deny the application of petitioner Gross for the return of certain papers and documents illegally seized and for the suppression of such evidence.

Argument.

I.

It was error to admit, over petitioners' objection and exception, evidence of intrastate telephone communications intercepted, in violation of the Penal Law of the State of New York, by persons acting under the direction of agents of the United States, by tapping telephone wires which were conduits of both intrastate and interstate communication.

A.

Such evidence was rendered inadmissible by Section 605 of the Federal Communications Act (Ch. 652, 48 Stat. 1064, 1103; U. S. C. Title 47, Section 605).

The decision of the Court below upon this point is squarely in conflict with the decisions of the Circuit Courts of Appeals for the Third and Sixth Circuits upon the same question.

Sablowsky v. *United States*, 101 F. (2d) 183 (C. C. A. 3rd, 1938)

Diamond v. *United States*, 94 F. (2d) 1012 (C. C. A. 6th, 1938). See also opinion on reargument annexed to this brief.

This Court has once attempted to resolve that conflict by granting certiorari in *Valli* v. *United States* (58 Sup. Ct. 760), but since the *Valli* case was never brought on for argument, the question has never been passed upon by this Court. The case at bar presents an opportunity for this Court to decide the question once and for all.

Section 605 (quoted in full in the petition) provides in part:

> "* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *"

In *Nardone* v. *United States*, 302 U. S. 379 (1937) this Court held that by virtue of this statute, evidence of telephone communications procured by Federal officers by "tapping" telephone wires was inadmissible in a criminal trial in a Federal court. The Court construed Section 605 and held that the words "no person" applied to Federal officers and that the word "divulge" applied to testimony in Court.

The particular communications involved in the *Nardone* case were interstate communications, although no point of that fact was made by the Court. The question which was stated for decision and answered in the negative by the Court was "broad enough to include the question now presented". *United States* v. *Plisco*, 22 Fed. Supp. 242, 243; *Diamond* v. *United States*, 94 Fed. (2d) 1012; *Sablowsky* v. *United States*, 101 Fed. (2d) 183.

In the case at bar the Circuit Court of Appeals has held that the rule of the *Nardone* case is inapplicable on the ground that the communications here involved (with one possible exception) were intrastate. In reaching this conclusion, the Court below decided that Section 605 applies only to interstate communications. It based its construction of the statute upon two principal grounds: (a) that the language of Section 605 itself shows that only interstate communications are within the scope of the statute; and (b) that other sections of the Federal Communications Act, notably Sections 1 and 2 thereof, show that the Act applies only to interstate communications. Petitioners respectfully submit that both grounds are untenable and that the construction placed upon the statute by the Court below is erroneous.

(a) With respect to the language of Section 605 itself, it will be noted that that Section contains four principal clauses. The first clause relates to the divulging of telephone communications by persons who receive or transmit them. The third clause relates to the use of the information contained in telephone communications to be made by persons who receive the same. These two clauses are obviously to be read together. In each of these clauses the telephone communications referred to are distinctly limited to "interstate or foreign communications".

The case at bar, however, does not involve any divulging or use of telephone communications by persons who received or transmitted them. We are here concerned rather with *interception* of such messages. This subject is governed by the second and fourth clauses of Section 605. The second clause, quoted above, prohibits the interception and divulging of communications. The fourth clause, which is to be read with the second, deals with the use to be made of "such intercepted communication" by persons who have become acquainted with their contents.

The second and fourth clauses, which are the portions of the statute applicable here, are not limited to "interstate or foreign communications" but specifically apply to "any communication".

This difference in the language of the various clauses of Section 605 is of vital significance upon the problem here presented. It shows that with respect to *intercepted* messages Congress intended that the prohibition of the statute should apply to all communications regardless of their interstate or intrastate character. It shows that when the Court below held that Section 605 applied only to interstate communications, it was erroneously basing its construction upon those clauses of Section 605 which do not apply to intercepted messages, and was ignoring the language of the portions of the Section which are in point here.

(b) With regard to other sections of the Communications Act, apart from Section 605, the Court below placed emphasis upon Section 1 (47 U. S. C. Section 151) which states that the Federal Communications Commission is created "for the purpose of regulating interstate and foreign commerce in communication by wire and radio". The Court below also mentioned Section 2 of the Act (47 U. S. C. Section 152) which states that "the provisions of this chapter shall apply to all interstate and foreign communication by wire or radio".

It is apparent that neither of these preliminary provisions of the statute has any bearing upon the construction of Section 605. If it can be said that the purpose of the statute, as a whole, was to secure privacy for interstate and foreign communications, it must follow that the regulation and protection of such communications cannot be effected unless the statute prohibits the interception of intrastate communications, for, as the Circuit Court of Appeals in the *Diamond* case, *supra*, said:

"If a federal agent is permitted to listen in on a telephone conversation he of course hears all that is said regardless of its nature. He is given an opportunity to hear and disclose that which he is forbidden to hear and disclose and to that extent the privacy which the Communications Act manifestly intends to secure for both interstate and foreign communications by telephone is destroyed."

Section 605, moreover, is not one of the regulatory provisions governed by sections 1 and 2 of the Act. It is included toward the end of the Act under Title VI thereof headed "Miscellaneous Provisions". It must be construed by itself, independent of the earlier provisions of the statute which deal with an entirely different subject.

Sablowsky v. *United States*, 101 F. (2d) 183 (C. C. A. 3rd, 1938);
Diamond v. *United States*, 94 F. (2d) 1012 (C. C. A. 6th, 1938). See also opinion on reargument annexed to this brief.

Petitioners respectfully urge that such a construction is not only required by the language of the Communications Act itself, but also that it is the only construction which is supported by common sense. There is no valid basis for a distinction based solely upon the fortuitous circumstance of the geographical location of the speaker at the time of the illegal interception of his conversation. The ethical considerations which support the policy of excluding intercepted messages apply with as much force to intrastate as to interstate communications. It is "not to be assumed that Congress intended diverse and hostile rules for like situations".

United States v. *Plisco*, 22 F. Supp. 242 (D. C. 1938).

It is submitted that this Court should resolve the conflict which has arisen among the decisions of the various circuit courts of appeals by adopting a construction of Section 605 which gives effect to its language and which leads to a reasonable result.

B.

Apart from the Federal Communications Act, such evidence was rendered inadmissible by the Fourth and Fifth Amendments to the Constitution of the United States.

In *Olmstead* v. *United States*, 277 U. S. 438 (1927), it was held by a closely divided Court, that the interception of telephone messages by "wiretapping" was not an illegal search and seizure, within the meaning of the Fourth Amendment, and that a defendant against whom evidence had been obtained by such means was not compelled to be a witness against himself within the meaning of the Fifth Amendment. The construction placed by the majority of the Court upon the Fourth Amendment limited the application of that Amendment to searches and seizures of physical objects and hence excluded the case of the overhearing of oral conversations.

It is respectfully urged that such a narrow construction of the Fourth Amendment is not required by its terms and by the previous decisions of this Court and that this Court should take this occasion to reconsider the question of the applicability of the Fourth Amendment and should overrule its decision in the *Olmstead* case.

C.

Apart from the Federal Communications Act and the Fourth and Fifth Amendments, such evidence is rendered inadmissible by the fact that it was obtained by the criminal act of agents of the United States in violation of State law.

In *Olmstead* v. *United States, supra*, the Court recognized that evidence obtained by wiretapping in violation of State law was evidence procured by the criminal act of agents of the United States. Nevertheless, the majority of the Court held that this fact did not justify carving out an exception to the general common law rule that evidence illegally obtained is nevertheless admissible. The dissenting justices rendered a vigorous protest against this decision. Mr. Justice Holmes, dissenting, stated:

> "But I think, as Mr. Justice Brandeis says, that apart from the Constitution the Government ought not to use evidence obtained and only obtainable by a criminal act. * * * We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part. * * * If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed" (*Olmstead* v. *United States*, 277 U. S. 438 at pp. 469-70).

Since the decision in the *Olmstead* case, there has been a rising tide of public opinion against the practice of wiretapping under the supervision of Federal officers. Illustrative of this opinion is the statement by Honorable Herbert H.

Lehman, Governor of the State of New York (New York Times, June 18, 1938) with reference to wiretapping:

> "It has been the vehicle of great oppression and persecution. It has caused people to be afraid of discussing their most intimate personal problems. * * * I am particularly concerned with the danger of wiretapping. Today no one is safe from the menace of it."

This view was expressly recognized by this Court in the *Nardone* case, *supra*, in which the Court stated:

> "For years controversy has raged with respect to the morality of the practice of wire-tapping by officers to obtain evidence. It has been the view of many that the practice involves a grave wrong" (*Nardone* v. *United States*, 302 U. S. 379, 384).

It has been suggested that the *Nardone* decision has overruled *Olmstead* v. *United States*, *supra*, on this point. See dissenting opinion of Judge Morton in *Valli* v. *United States*, 94 F. (2d) 687.

Petitioners urge that the views set forth by Judge Morton and by the dissenting justices in *Olmstead* v. *United States* should be adopted by this Court and that the *Olmstead* case should be definitely overruled. Wholly apart from the effect of the Federal Communications Act and the effect of the Fourth and Fifth Amendments, it lies within the power of this Court to lay down common law rules of evidence for the conduct of criminal trials in the Federal courts. As Mr. Justice Holmes said in the *Olmstead* case:

> "There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules" (*Olmstead* v. *United States*, 277 U. S. 438, 470).

This Court should give effect to the point of view which it recognized in the *Nardone* case and should declare, once and for all, that the crime of Federal officers should not be tacitly condoned by the Federal Courts and that evidence obtained as the fruits of such crime should not be admissible in a criminal trial.

II.

The improper cross-examination of the petitioners Weiss and Gross and of their character witnesses and the summation of the United States Attorney deprived petitioners of a fair trial.

The repeated reading into questions put on the cross-examination of the petitioner Weiss and of his character witnesses of purported excerpts of documents not in evidence and assuming prejudicial statements of fact not borne out by the record and in suggesting that statements had been made to the prosecutor out of court, in respect of which no proof was offered, deprived the petitioners of their right to a fair trial.

Berger v. *United States*, 295 U. S. 78, 84;
People v. *Wells*, 100 Cal. 459, cited with approval in *Berger* case at p. 89;
Johnson v. *United States*, 215 Fed. 679, 686 (C. C. A. 7th, 1914);
People v. *Malkin*, 250 N. Y. 185, 197, likewise quoted with approval in *Berger* case;
People v. *Wolf*, 183 N. Y. 464, 472, 473;
People v. *Marendi*, 213 N. Y. 600, 618;
Pittman v. *U. S.*, 42 Fed. (2d) 793.

The summation of the United States Attorney was highly improper and constituted reversible error.

The United States Attorney told the jury that he had, prior to the indictment, formed a conviction of the petitioners'

guilt; that he was more convinced by what he learned during the preparation of the case, and that he had not the slightest doubt in his mind of petitioners' guilt (2573-4). He also stated that many of the exhibits which the jurors had seen and heard were "only a fraction" of the proof (2573). His remarks were permeated with his personal views, with allusions to the painful duty which he was performing, with comments about facts outside the record, with assertions of private knowledge of matters which had not been brought before the jury, with assurances that the Government in reality had much additional evidence which it had not bothered to produce. His summation did not purport to cover the facts of the case for he pointed out (2571) that the facts had already been covered by his assistants. The petitioners were denied their right to a fair trial by the summation of the United States Attorney.

Berger v. *United States, supra;*
Taliaferro v. *United States,* 47 Fed. (2d) 699, at p. 701;
Minker v. *United States,* 85 Fed. (2d) 425;
Commonwealth v. *Shoemaker,* 240 Pa. 255.

He appealed to the jurors' personal financial benefits and pointed to the sufferings of thousands of policyholders which would result from a verdict of acquittal. This was manifestly improper.

Beck v. *United States,* 33 Fed. (2d) 107 (C. C. A. 8th, 1929);
Read v. *United States,* 42 Fed. (2d) 636 (C. C. A. 8th, 1930);
Turk v. *United States,* 20 Fed. (2d) 129 (C. C. A. 8th, 1927);
Robinson v. *United States,* 32 Fed. (2d) 505 (C. C. A. 8th, 1928).

E.

CONCLUSION.

For the reasons stated in the petition and in this brief it is respectfully submitted that the application for a writ of certiorari should be granted.

Respectfully submitted,

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Diamond v. United States, (C. C. A. 6th Cir.)

Per curiam opinion upon rehearing filed April 11, 1938

"These cases are before us upon petition to rehear. The petition states 'of approximately 150 telephone interstate calls,* the rest all being intrastate calls,' and that the order made by which the cases were reversed is silent as to the effect of the Communications Act of 1934 upon intrastate calls. The declared purpose of the Communications Act was to regulate interstate and foreign commerce in communications by wire or radio. Section 605 thereof contains the provision,—

'And no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person.'

"With reference to this provision the Supreme Court in *Nardone* v. *United States*, December 20, 1937 said:

'Taken at its face value the phrase "no person" comprehends federal agents, and a ban on communication to "any person" bars testimony to the content of an intercepted message.'

* Obviously a misprint. The petition of the United States Attorney reads (p. 3), "of approximately 150 telephone conversations introduced into evidence only four or five were interstate calls, the rest being intrastate calls."

"It further said:

'We nevertheless face the fact that the plain words of Section 605 forbids anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that "no person" shall divulge or publish the message or its substance to *"any person"*. To recite the contents of the message in testimony before a court is to divulge the message. The conclusion that the act forbids such testimony seems to us unshaken by the government's arguments.'

"It seems to us that the privacy to be achieved by the mandate of the statute is the privacy of a conduit or instrumentality of interstate communication, though the same physical equipment may likewise be the means by which intrastate communications are made. The broad scope and constitutional validity of statutes have been sustained where instrumentalities serve both interstate and foreign commerce, even when applied in specific instances to transactions which are not interstate commerce. So the Federal Safety Appliance Act as an exercise of Federal power under the commerce clause has been held to extend to all vehicles used upon a highway of interstate commerce whether the vehicles themselves are so engaged or not, for the safety to be secured by the Act is the safety of the persons transported in interstate commerce, no matter what may be the source of the dangers which threaten it. *Southern Ry. Co.* v. *United States*, 222 U. S. 20, 25, 26; *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, 41.

"It seems clear enough that the statute prohibits the interception by 'wire tapping' of all telephone communications and the subsequent disclosure thereof by all persons except those authorized by the sender. *Neither federal agents nor intrastate communications are excluded.* If a federal agent is permitted to listen in on a telephone conversation he of course hears all that is said regardless of whether the communication is interstate or intrastate in its nature. He is given an opportunity to hear and disclose that which he is forbidden to hear and disclose and to that extent the privacy which the Communications Act manifestly intends to secure for both interstate and foreign communications by telephone is destroyed.

The petition to rehear is denied." (Italics ours.)

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No. [redacted] 42

IN THE

Supreme Court of the United States

OCTOBER TERM 1938

JOSEPH J. WEISS, MARTIN GROSS, DR. GEORGE KRUPP and DR. MAXIMILIAN GOLDSTEIN,

Petitioners,

—*against*—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF THE PETITIONERS.

LLOYD PAUL STRYKER,
Attorney for Petitioner
Joseph J. Weiss.

THEODORE KIENDL,
Attorney for Petitioner
Dr. Maximilian Goldstein.

JACOB W. FRIEDMAN,
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Petitioners,

—*against*—

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REPLY BRIEF OF THE PETITIONERS.

1. The Government concedes that this case "would clearly be an appropriate one for review by this Court",[1] except that a claimed "distinction" lies between the instant case and the other pertinent decisions in that the Government agents in this case who had intercepted the communications did not testify to them. The Court below did not recognize any such distinction despite its presentation by the Government.[2] The attempted distinction was so lacking in merit that the Court below did not even deign to mention it in its opinion. It held that the communications were admissible because it regarded[3] the decision in *Valli* v. *United States*,[4] rather than in the *Diamond* and *Sablowsky* cases as properly interpreting Section 605. If the Government's argument, which was presented to the Court below were sound, the Court below, it is submitted, would have distinguished this case from *all* those decisions—including the cases relied upon by petitioners—rather than choose between the conflicting holdings.

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[1] P. 3 Govt. reply memorandum to petition.

[2] P. 3 Govt. reply memorandum to petition.

[3] P. 5 opinion Court below.

[4] 94 Fed. (2d) 687.

The unsoundness of the argument is manifest. "The privacy of the conduit" and of the communications passing through it were intended to be secured by the act.[1] The statute goes further than the mere prohibition against interception, for it bars divulging the existence or contents after interception. The statute bars publication both in and out of Court. It expressly provides that no unauthorized person shall "divulge or publish" such intercepted message "to any person". The word "any" this Court has held in the *Nardone* case[2] means all. In the instant case stenographers in the employ of the insurance companies listened to the intercepted communications. They took stenographic notes. The records were played, it is clear from the case on appeal, to the Government agents and the United States Attorneys. They were stenographically transcribed. The stenographic transcripts were produced by the Assistant United States Attorneys. They did not transcribe the messages. Consequently when they received the transcripts there was a divulging and publication in contravention of the statute. Were it not for the interception and for the publication by those who intercepted[3] to the Federal agents themselves, the Government would not have had such proof. There was thus a divulging before the trial commenced.

Moreover the Government concedes that upon the trial the defendants Nelson, Berger, Spitz and Dr. Messman identified the communications. The Government admits that the records containing the communications were played in open court. Inspector Shea testified concerning the recordings.[4] Realistically speaking, the medium of proof was in substance the same as though the agents had testified fully to the conversations. There can be no doubt that, in fact, the contents of the intercepted communications were "divulged" in court.

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[1] *Diamond* v. *U. S.*, 94 Fed. (2d) 1012.

[2] 302 U. S. 379.

[3] Acting for the Government.

[4] Pp. 586-588.

A reading of this record cannot help but force one to conclude that the testimony of Nelson, Berger, Spitz and Messman if not induced, as they said, by promises of leniency, was induced by hopes and expectations of leniency. Their expectations were realized. Messman's license to practice medicine was not revoked by any proceedings of the Government and he continued to practice medicine with the knowledge of the United States Attorney.[1] He was not required by the Government to plead to the indictment. He was paid by the Government.[2] He has not been sentenced according to the docket entries contained in this record. Nelson was also paid a weekly stipend by the Government.[3] His sentence was suspended; Berger's sentence was suspended; Spitz's sentence was suspended.[4]

The Government presents in this Court the argument it presented in the Court below that Section 605 does not forbid the authorized publication of intereepted communications and that since the communications were divulged in the case at bar with the sanction of one of the parties to the conversation, the statute was not violated.

This contention is without merit. The statute provides that "no person not being authorized by the sender shall intercept any communication and divulge or publish * * * such intercepted communication". Thus, consent or authority must precede the interception as well as the publication of the intercepted message. The Government's argument[5] that the Section permits the divulgence of intercepted communications if the sender has authorized such divulgence, begs the entire question. Even though a person who divulges a com-

[1] Pp. 596, 31-40.
[2] P. 868.
[3] Pp. 365-6.
[4] Pp. 31-39.
[5] P. 6 Answering memorandum of Government.

munication was authorized by the sender so to do, he could not, according to the plain mandate of the statute, do this in the absence of authority to intercept. His authority from the sender must include both interception and divulgence.

Even the Government does not go so far as to contend that in the instant case a party to the conversation authorized the *interception*. No subsequent permission to divulge—for whatever the inducement may have been—given by one of the parties to a conversation could afford an original license to tap the wires.

The vice which the statute was designed to eradicate was the pernicious practice of wire-tapping. To give effect to that purpose it has been deemed necessary to exclude from evidence in federal courts the products of the illegal practice. Now the Government urges that the expedient of arresting one of the parties to a conversation and inducing him to "disclose" it, should entitle the prosecution to place wire-tapped phonograph records in evidence and thus frustrate the objects of the law. To sanction such a course would render the statute substantially ineffective.

The Government contends that since one of the parties to certain of the conversations pleaded guilty and testified for the Government he presumably authorized the disclosure of the conversations and that such authorization constitutes consent by the "sender" of the communication within the meaning of Section 605. The answer to such an argument is manifest. Each party to a telephone conversation is the "sender" with respect to his particular portion of the conversation. The obvious purpose of the statute is to protect a party to a conversation from its interception and disclosure without his consent. To permit such interception and disclosure solely upon the consent of the other party to the conversation is in effect to nullify the statute.

The Government also maintains that neither party to a conversation has an exclusive property right in it, since either party could testify to its substance without the consent of the other. This may be true as a general common-law principle, but it obviously has no bearing upon the construction of Section 605. The statute expressly prohibits interception and publication without the consent of the sender. Hence, in considering the effect of the statute, consent of the "sender" is manifestly necessary, and any general common-law principle to the contrary has no application.

The statute was designed, as the Circuit Court of Appeals said in the *Diamond* case, to secure the privacy of the instrumentality and the communications passing over it. The statute was thus aimed to protect the communication and to prevent its divulgence without the consent of both parties.

We must take a realistic view of what would occur if the Government's argument were accepted. Agents would intercept in the hope that by some course of conduct "sanction" could be procured from one of the parties. If "sanction" was not induced, the results of interception could then be injected into the record under the guise of cross-examination, as was done in this case when the defendant Weiss was cross-examined concerning alleged telephonic communications,[1]—not in evidence—which, parenthetically speaking, the Government states in its reply memorandum were used "merely for the purpose of refreshing the recollection of the petitioner Weiss on cross-examination".[2]

Whether it was intended to refresh Weiss' recollection is irrelevant. The point is that the contents of the intercepted communications not in evidence were placed before the jury in the guise of questions and were thus divulged.

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[1] Pp. 1908-1929, 1966-1969, 2000-2003.

[2] P. 2, Government's memorandum.

2. It is respectfully submitted that as to the other questions raised by petition the defendants were improperly cross-examined, their character witnesses were likewise prejudicially cross-examined. They were also prejudiced by the highly improper summation.

3. It is submitted that it was vital for the trial judge to charge the jury as requested concerning the statutory fees of Government witnesses. The jurors may very well have received the impression that the Government had authority to pay weekly stipends, as it did. The jurors were entitled to know whether the Government itself in its effort to convict the defendants, went beyond the rights conferred upon it by statute.

It is submitted that the points referred to in paragraphs 2 and 3 on pages 7 and 8 of the Government's memorandum themselves warrant certiorari. The questions there presented are of a fundamental character; they present to this court a question as to whether the defendants received a fair trial as guaranteed to them by the Constitution. The language of the New York Court of Appeals in the case of *People* v. *Wolf*[1] where a witness was improperly cross-examined and the language of Miller, *J.* in *People* v. *Marendi*[2] is applicable to the case at bar. Judge Miller said:

> "We frequently hear it said that a particular matter complained of did not affect the result, when it is patent that it was introduced in the belief that it might improperly influence the result. Our disregard of such errors seems to be taken as authority for their repetition and extension in other cases.
>
> What are technical errors[3] not affecting the sub-

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[1] 183 N. Y. 464, 472.

[2] 213 N. Y. 600, 619.

[3] We call the court's attention to the fact that the Court of Appeals is required to give judgment "without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties." (Code Criminal Procedure, section 542.)

stantial rights of the parties? It would require some boldness to hazard an all-inclusive definition, and I shall confine myself to exclusion. * * * Such a course will simply mean in the long run the abolishing of all forms of law taught by experience to be necessary to the protection of the innocent and the decision of criminal cases on appeal solely on the facts. If trial by jury is to be maintained, the right of every accused person to be tried in accordance with established forms of law must be respected. * * * but where prejudicial matter is erroneously received in evidence on a disputed question of fact, its harmful character cannot be determined solely by the mere weight of competent evidence unless we are to resolve ourselves into a jury and, ignoring the finding upon incompetent evidence, substitute one upon the evidence which we may deem competent."

CONCLUSION.

The writ of certiorari should be granted. The conflict in authority with regard to the interception of intrastate communications should be settled.

The questions of the interception of telephone communications, of the propriety of the cross-examination of the defendants and of their character witnesses, and the summation are of far-reaching importance to the rights and liberties of American citizens and those who stand accused in the courts of justice of the United States. We can, therefore, conceive of no case involving more "special and important reasons"[1]

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[1] Rules Supreme Court of United States, sec. 38, subd. 5.

for granting certiorari than those presented in the case at bar.

Respectfully submitted,

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No. 42

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Supreme Court of the United States

October Term—1939

JOSEPH J. WEISS, MARTIN GROSS, DR. GEORGE KRUPP and DR. MAXIMILIAN GOLDSTEIN,

Petitioners,

—*against*—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF PETITIONERS

LLOYD PAUL STRYKER,
Attorney for Petitioner,
Joseph J. Weiss.

THEODORE KIENDL,
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Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

BRIEF ON BEHALF OF PETITIONERS

Opinions Below.

No opinion was rendered by the United States District Court for the Southern District of New York, before which Court the case was tried.

The opinion of the Circuit Court of Appeals for the Second Circuit appears in the record at pages 116-125. It is reported at 103 F. (2d) 348.

Jurisdiction.

Certiorari to review the judgment of the Circuit Court of Appeals entered on April 13, 1939 (R. 126) was granted by this Court on June 5, 1939 (R. 126), upon a petition therefor based upon Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, Ch. 229 Sec. 1; 43 Stat. 938; 28 U. S. C. A., Sec. 347(a).

The Questions Presented.

The judgment appealed from affirms the conviction of the petitioners in the District Court of the United States for the Southern District of New York under an indictment of the petitioners, among others, for use of the mails to defraud, in violation of Title 18, U. S. C. Section 338 [U. S. C. C. Section 215]; and for conspiracy to use the mails to defraud, in violation of Title 18, U. S. C., Section 88 [U. S. C. C. Section 37].

In granting the petition for a writ of certiorari, this Court limited review to the question whether the trial court properly received in evidence intercepted telephone communications. Under this limitation, the questions presented are as follows:

(1) Should the evidence of intercepted intrastate telephone communications have been excluded by virtue of the wire-tapping provisions of Section 605 of the Federal Communications Act of 1934?

(2) Should the evidence of intercepted intrastate telephone communications have been excluded by virtue of the Fourth and Fifth Amendments to the Constitution of the United States?

(3) Should the evidence of intercepted intrastate telephone communications have been excluded by virtue of Section 1423, Subdivision 6, of the Penal Law of the State of New York?

Statement of the Case.

The alleged scheme charged against the petitioners in the indictment under which they have been convicted was a scheme to defraud insurance companies by inducing them to pay false claims for disability, health and accident benefits. Defendants Nelson, Berger and Spitz (who pleaded guilty and testified for the Government) were holders of insurance policies who presented to insurance companies fraudulent claims of disability resulting from heart disease. Defendant Messman, a physician (who also testified for the Government), assisted the claimants by furnishing them with false medical certificates and by instructing them in the method of simulating illness. Petitioner Weiss, a lawyer, and petitioner Gross, an insurance agent, were alleged to have contributed their professional talents to the furtherance of the claims, with knowledge of their falsity. Petitioner Goldstein, a physician, was charged with furnishing a false certificate in aid of the Nelson claim, and petitioner Krupp, also a physician, with having furnished such a certificate in aid of the Spitz claim. The conspiracy and scheme thus charged in the indictment covered a period from January 15, 1934 to the date of the filing of the indictment on July 30, 1937. Nineteen counts charged use of the mails to defraud and the twentieth count charged conspiracy.

Petitioners Weiss, Goldstein and Gross were convicted on all counts except those numbered 8 and 12, and petitioner Krupp on all except those numbered 8 to 13 inclusive.

A vital part of the Government's case, received over petitioners' objections and exceptions, was derived from telephone communications, intercepted by tapping telephone wires. Three categories of evidence are involved in this connection:

(1) Evidence of seventy-six intercepted intrastate telephone communications was directly introduced and admitted (R. 129);

(2) The contents of three intercepted intrastate telephone communications, while not directly placed in evidence, were put before the jury in the form of questions of the prosecutor (R. below 2000, 2003, 1963-9, 1908-25)[1];

(3) Evidence of one intercepted telephone communication was directly introduced and admitted despite the absence of any proof as to whether the communication was intrastate or interstate (Ex. 307, R. below 1334; 2114).

The telephone wires thus tapped were those of the office of the petitioner Weiss, located in the City of New York (R. 64), and of the defendant Messman, also located in the City of New York (R. 64). Every call from or to the Weiss office was intercepted and recorded (R. 82) regardless of whether the call was interstate or intrastate (R. 83). It is conceded that interstate calls were made from the Weiss office (R. 129) and the tapped wires were thus conduits of both interstate and intrastate communication.

The taps were placed on the telephone wires by a New York City policeman, McGlynn (R. 64), acting under the instructions of an United States Postal Inspector, Shea (R. 64). The work of intercepting and recording the communications was carried out by employees of Harley Detective Agency, a private detective agency, acting under the direct control and supervision of agents of the United States (R. 67). The intercepted communications were recorded directly upon a

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[1] The record in this Court has been greatly condensed by stipulation, upon the agreement that either party may refer to any portion of the complete transcript of record filed in this Court on petition for writ of certiorari (R. 130). The complete transcript of record will be cited herein as "Record below".

phonographic disc and stenographic transcripts of the conversations were also made. The cost of the work was defrayed by insurance companies (R. 91) and stenographers employed by insurance companies or their attorneys assisted in transcribing and recording the intercepted messages (R. 90). Each night the records and stenographic transcripts of the communications intercepted during the day were delivered to the United States Attorney or his representatives (R. 74). These activities were carried on for a period of months prior to the finding of the indictment (R. 75).

The wire-tapping constituted a criminal offense under the laws of the State of New York (New York Penal Law §1423, subd 6).

After the arrest of the defendants upon the return of the indictment, the defendants Messman, Nelson, Berger and Spitz were confronted with records of conversations in which they had participated. These defendants thereupon decided to turn state's evidence and to assist the Government. It is fair to say that this decision on their part was prompted by special consideration on the part of the Government and by hopes, if not promises, of leniency. Throughout the long period between his arrest and the date of trial, Messman received a salary from the Government, originally in the amount of $65 per week and later raised to $100 per week. The total compensation thus paid him up to the date of trial was $3,227.12 (R. below 814). Nelson received a salary of $50 per week or a total of $1,755 (R. below 365-366). Berger received $50 per week from a person which he did not identify (R. below 1570). Spitz received from an insurance company the sum of $1,700 for the surrender of a policy, the cash value of which was only $878.40 (R. below 1237). At the conclusion of the trial, Nelson, Berger and Spitz received suspended sentences (R. 30). Messman was not sentenced and his license to practice medicine was not revoked (R. below 863-4).

Messman, Nelson, Berger and Spitz assisted the United States Attorney in the preparation of the case for trial, particularly with respect to the evidence of intercepted telephone communications. They listened to the records of their conversations as they were played to them in the United States Attorney's Office, compared the phonographic record with a typewritten transcript of the conversation and corrected the transcript when necessary (R. 35). They identified both the record and transcript by initialing them (R. 35).

At the trial a phonograph was set up in the courtroom directly opposite the jury. It was operated by an employee of the Harley Detective Agency (R. 62-3). The witnesses (Messman, Nelson, Berger and Spitz) were then shown the records and stenographic transcripts of the conversations which they identified by virtue of the initials which they had previously placed upon them (R. 35). Both the records and stenographic transcripts were then received in evidence over defendants' objection and exception (R. 33-34); copies of the transcript were handed to the jury and the records were played upon the phonograph, with considerable dramatic effect.

It is deemed unnecessary to analyze the evidence obtained through wire-tapping inasmuch as its prejudicial nature has been asserted by the Court below and virtually conceded by the Government. Thus, the Court below said (R. 119-120):

> "Such evidence weighed against Goldstein and his conviction ought not to stand if the communications implicating the others were improperly received."

Further (R. 120):

> "The defendant Weiss is in the same position and his conviction can only stand if we are right in holding

> that the communications derived through wire tapping were competent evidence. Weiss, who was a party to conversations obtained through thirty-four wire taps was prejudiced by their admission unless they were lawfully received in evidence."

The Court also held specifically that the petitioners Gross and Krupp were prejudiced if the intercepted communications were improperly admitted (R. 120).

The evidence in question, according to the statement of the United States Attorney, in his summation, constituted the "crux" of the prosecution's case (R. below 2575). And in its brief opposing certiorari, the Government said (Br. p. 2):

> "The Circuit Court of Appeals was of the opinion that if the intercepted messages were improperly admitted, each of the petitioners was prejudiced, and the Government does not dispute that this is so if all of them were inadmissible."

Specification of Errors To Be Urged.

Under the limitation imposed by this Court in granting certiorari, the only specified errors open to review are the errors which petitioners insist were committed by the trial court in admitting evidence of intercepted intrastate telephone communications in violation of

> (1) Section 605 of the Federal Communications Act of 1934, (2) the Fourth and Fifth amendments to the Constitution of the United States, and (3) Section 1423, Subdivision 6, of the Penal Law of the State of New York.

Statutes Involved.

First: Section 605 of the Federal Communications Act of 1934 (Ch. 652, 48 Stat. 1064, 1103; Title 47, U. S. C., Section 605):

"605. Unauthorized publication or use of communications.—No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, sub-

stance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, c. 652, §605, 48 Stat. 1103.)"

Second: The Fourth and Fifth Amendments to the Constitution of the United States:

"ARTICLE FOUR

Security from Unwarrantable Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE FIVE

Rights of Accused in Criminal Proceedings

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Third: Section 1423, Subdivision 6 of the Penal Law of the State of New York:

"A person who wilfully or maliciously displaces, removes, injures, or destroys: * * *

6. A line of telegraph or telephone, wire or cable, pier or abutment, or the material or property belonging thereto, without lawful authority, or shall unlawfully and wilfully cut, break, tap, or make connection with any telegraph or telephone line, wire, cable or instrument, or read or copy in any unauthorized manner any message, communication or report passing over it, in this state; or who shall wilfully prevent, obstruct or delay, by any means or contrivance whatsoever, the sending, transmission, conveyance or delivery, in this state of any authorized message, communication or report by or through any telegraph or telephone line, wire or cable, under the control of any telegraph or telephone company doing business in this state; or who shall aid, agree with, employ or conspire with any person or persons to unlawfully do, or permit or cause to be done, any of the acts hereinbefore mentioned, or who shall occupy, use a line, or shall knowingly permit another to occupy, use a line, a

room, table, establishment or apparatus to unlawfully do or cause to be done any of the acts hereinbefore mentioned;

* * * * * *

* * * is punishable by imprisonment for not more than two years."

Summary of Argument.

POINT I.

The evidence derived from intercepted telephone communications was inadmissible because it was obtained and divulged in violation of Section 605 of the Federal Communications Act.

A. Wire-tapping provisions of Section 605 apply to intrastate as well as interstate communications.

1. The language of the statute shows that it applies to intrastate communications.

2. The purpose of the statute, as revealed by the evils which it was designed to remedy, shows that it applies to intrastate communications.

B. The interception and divulgence of the communications were not "authorized by the sender", within the meaning of Section 605.

POINT II.

The evidence derived from intercepted telephone communications was inadmissible because obtained and received in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

POINT III.

The evidence derived from intercepted telephone communications was inadmissible because obtained in violation of State Statute.

POINT I.

The evidence derived from intercepted telephone communications was inadmissible because it was obtained and divulged in violation of Section 605 of the Federal Communications Act.

It is now settled that Section 605 prohibits wire-tapping by Federal officers as well as by private persons, and that the "divulgence" of intercepted communications, which is prohibited by the statute, includes testimony to such communications in Court.

Nardone v. *United States*, 302 U. S. 379 (1937).

Two questions remain: (a) Whether Section 605 applies to intrastate as well as to interstate and foreign communications. (b) If so, whether in this case the interception and divulgence of the communications were "authorized by the sender", within the meaning of Section 605.

The first question was discussed at length by the Court below. The second was not mentioned in the Court's opinion although the point was argued before that Court by the Government and has again been urged in the Government's brief in opposition to petitioners' application for certiorari. Each of these questions will be considered in this brief.

A. Wire-tapping provisions of Section 605 apply to intrastate as well as interstate communications.

The pertinent portion of the Section (quoted in full *supra* p. 8) provides that:

> "* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * * and no person having received

such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof * * *."

The Court below based its affirmance of the conviction upon the proposition that these provisions do not apply to intrastate communications. In so construing the Section, the Court below followed the decision of the First Circuit in *Valli* v. *United States*, 94 F. (2d) 687 (1938)[1] and expressly rejected the contrary decisions of the Sixth and Third Circuits respectively, in *Diamond* v. *United States*, 94 F. (2d) 1012 (1938)[2] and *Sablowsky* v. *United States*, 101 F. (2d) 183 (1938). The Court stated that in view of this conflict of decisions, it reached its result "with some hesitation" (R. 119).

Petitioners contend that the construction placed upon the statute by the Court below was erroneous and that this conclusion follows from a consideration of (1) the words of the statute itself and (2) the underlying purpose of the statute as revealed by the examination of the evils which it was designed to remedy.

1. The language of the statute shows that it applies to intrastate communications.

(a) It will be observed that the Section contains four principal clauses or subdivisions, separated by semicolons. The

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[1] This Court granted certiorari (*Valli* v. *United States*, 58 Sup. Ct. 760) but thereafter further proceedings were abandoned by the petitioners and the case was never argued in this Court.

[2] The question was discussed most thoroughly in an unreported opinion of the Court in the *Diamond* case denying the Government's motion for a reargument. This opinion is included in an appendix to the brief heretofore filed by petitioners in support of the petition for certiorari.

first and third subdivisions prohibit the unauthorized divulging or use of any "interstate or foreign communication" by persons *receiving* or *transmitting* the same. The second and fourth subdivisions deal with the *interception* of messages; they prohibit the interception of "*any* communication"; they prohibit the divulging of such intercepted communication to any person, and they prohibit the use of information derived from "such intercepted communication".

Literally construed, therefore, the interception provisions of Section 605, which are the provisions here involved, apply to all communications, intrastate as well as interstate and foreign. The natural meaning of "any" includes "all". This Court has heretofore given effect to such a meaning in the construction of statutes. Thus, in *Nigro* v. *United States*, 276 U. S. 332 (1928), in which this Court construed Section 2 of the Anti-Narcotic Act [38 Stat. 785; 40 Stat. 1057, 1130], it was held that the phrase "any person" included all persons, and that it was not to be limited to a particular class of persons mentioned in a prior section of the statute.

The burden is thus fairly cast upon those who seek to establish an interpretation other than that required by the fair meaning of the words used.

(b) The primary argument advanced against this construction is that the context of other provisions of the Communications Act "seems to limit the application of §605 to interstate and foreign messages" (opinion below R. 117). Thus, the Court below noted that the first Section of the Act (47 U S. C. Section 151) declares that the Communications Commission was created for the purpose "of regulating interstate and foreign commerce in communication by wire and radio", and the next Section of the Act (47 U. S. C. Section 152) provides that:

> "(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio * * *

> (b) Subject to the provisions of section 301, nothing in this act [chapter] shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service of any carrier, * * *."

It would seem clear that the carefully drawn delimitation provisions of Subsection (b) in no wise limit the scope of the interception or wire-tapping provisions of Section 605. Those provisions prohibit interception and the divulging of intercepted communications; they do not concern the Commission or its "jurisdiction" or regulatory powers.

Eliminating Subsection (b), the argument against a literal construction of Section 605 is that the basic object of the Act, as expressed in Section 1 and Section 2 (a), is to protect and regulate interstate and foreign communications, and hence that it is not to be supposed that Congress intended to prohibit the interception or divulging of intrastate communications.

We think the argument is neither persuasive nor sound. One answer to it may be found in the opinion of the Third Circuit in *Sablowsky* v. *United States, supra*, namely, that the wire-tapping provisions of Section 605 are not regulatory provisions, and hence that the purpose behind the regulatory portions of the Act has no bearing upon the construction of Section 605. As the Court there said (p. 189):

> "It will be noted that the provisions of Section 605 are very different in their nature from those of the other sections of the Communications Act which in fact relate to the regulation of common carriers by wire and radio. * * * Upon the other hand the provisions of the second and fourth clauses of Section 605, which upon their face purport to relate to all per-

sons, do not relate to the regulation of communication carriers and therefore constitute a rule of evidence in the purest sense."

Moreover, wholly apart from such considerations, there is a second answer which we feel to be conclusive. It is a matter of common knowledge, of which this Court may take judicial notice, that the wires of modern telephone systems are designed to carry and do carry both interstate and intrastate communications and, indeed, that both kinds of messages may be and frequently are carried over the same wire simultaneously. In fact, the wires here involved concededly served both interstate and intrastate purposes (R. 129). Granting that the primary purpose of the statute is to protect interstate and foreign communications, it is obvious that such communications cannot be practically or effectively protected without protecting the wires which carry them, and an adequate protection of the wires obviously requires the complete prohibition of all interception and of the divulgence or use of all intercepted communications, whatever their nature or origin. As the Circuit Court of Appeals said in the *Diamond* case, *supra*[1]:

> "If a federal agent is permitted to listen in on a telephone conversation he of course hears all that is said regardless of whether the communication is interstate or intrastate in its nature. He is given an opportunity to hear and disclose that which he is forbidden to hear and disclose and to that extent the privacy which the Communications Act manifestly intends to secure for both interstate and foreign communications by telephone is destroyed."

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[1] See appendix to petitioners' brief on application for certiorari, page 30.

The Court below attempted to answer this argument by suggesting in its opinion that a prohibition against the *divulgence* of intrastate messages (as distinct from their interception) would not tend to protect the privacy of interstate communications (R. 118). Such a statement seems to us to ignore the realities of the situation. This Court has long recognized the principle that a prohibition against the doing of an illegal act can be made effective only by also prohibiting the subsequent use of the fruits of that act. This principle is, of course, the basis of the settled rule that evidence obtained in violation of the Fourth and Fifth Amendments may not be admitted in the Federal courts. *Weeks* v. *United States*, 232 U. S. 383 (1914).

Upon this subject this Court in *Olmstead* v. *United States*, 277 U. S. 438 (1928) said, in discussing the rule of the *Weeks* case and similar cases (p. 463):

> "But in the *Weeks* case, and those which followed, this Court decided with great emphasis, and established as the law for the federal courts, that the protection of the Fourth Amendment would be much impaired unless it was held that not only was the official violator of the rights under the Amendment subject to action at the suit of the injured defendant, but also that the evidence thereby obtained could not be received."

This language is equally applicable here. It is clear that the protection of the statute here in question would be much impaired unless it was held that not only was the official violator of the statute subject to prosecution, but also that the evidence thereby obtained could not be received. The privacy of interstate communications by wire and radio can be assured only by forbidding not only the interception but also the subsequent divulgence of all communications passing over those wires.

(c) It has also been argued that Section 605 itself, construed independently of the other provisions of the statute, discloses a purpose on the part of Congress to limit its provisions only to interstate and foreign communications. This was the view of the First Circuit in *Valli* v. *United States*, *supra*, which based this interpretation upon the fact that the first clause and third clauses of Section 605, which apply to persons engaged in receiving or transmitting communications by wire or radio, are expressly limited to interstate and foreign communications. The argument necessarily ascribes to inadvertence the difference in language of the second and fourth clauses of the Section, those which apply to interception, where no such limitation appears.

It may be noted at the outset that such an explanation of the difference in language is made more difficult when it is borne in mind that Section 605 of the Communications Act of 1934 was patterned very closely upon Section 27 of the Radio Act of 1927 (44 Stat. 1172; 47 U. S. C. 3107). There is, however, this significant difference in the two statutes. In the Radio Act of 1927 the words "interstate or foreign" did not appear in any of the four clauses of the Section, which referred only to "radio communications". When the Section was lifted almost bodily into the Communications Act of 1934, however, the words "interstate or foreign" were inserted in clauses 1 and 3 of the Section, but not in clauses 2 and 4. It would appear therefore that the difference in language was due to conscious design on the part of Congress and not merely to careless draftsmanship.

This conclusion is greatly strengthened when it is noted that there is a valid basis for such a distinction and a sound reason for limiting the application of clauses 1 and 3 to interstate and foreign communications and at the same time extending clauses 2 and 4 to all communications, including intrastate. Moreover, this reason is founded upon the prem-

ise that the fundamental purpose of the Section is to protect interstate and foreign communications and prevent their interception or divulgence. Granting this fundamental purpose, it will be seen that the problem confronting Congress in dealing with persons receiving or transmitting communications was different from that presented by persons intercepting them. In the former case, it was sufficient to forbid the divulgence or unauthorized use of interstate and foreign communications alone since, in the case of a receiver or transmitter, the nature of the particular communication would readily be susceptible of proof. In the case of the intercepter, however, it would be in most instances impossible to determine whether the particular communication intercepted was interstate or intrastate, and thus a provision against interception and divulgence of interstate communications only would be rendered incapable of practical enforcement. In the case of the intercepter, therefore, it was necessary to prohibit the interception and divulgence of all communications in order to be sure of protecting the privacy of interstate messages.

Moreover, difficulty of enforcement is not the only reason for the difference in the scope of the prohibition in the respective cases. Another reason is apparent when we consider the difference in the capacities of the persons against whom the prohibition is directed. Persons engaged in the business of receiving and transmitting communications by wire and radio are, of course, necessary to that business. It is impossible to prevent them from learning the contents of the messages which they transmit or receive. The most that Congress could do therefore was to prohibit the unauthorized divulgence of such messages. Bearing in mind the fundamental purpose to protect interstate communications, it was sufficient for Congress to prohibit the divulgence of such communications alone. Intercepters, however, are in a different category. They have no excuse for knowing

the contents of any message. In their case Congress could go farther and provide that they should have no contact whatever with the wires and should not intercept any communication regardless of its nature. Such a provision, undeniably more efficient to accomplish the fundamental purpose of the statute, was possible in the case of intercepters, whereas it was not possible in the case of receivers and transmitters who could not be denied access to the wires.

(d) If it be said that the literal construction (embracing intrastate as well as interstate communications) cannot be regarded as expressing the intent of Congress inasmuch as the regulatory power of Congress is confined to interstate commerce, the simple answer is that Congress has the power, repeatedly recognized and thoroughly established, to impose legislation affecting intrastate commerce whenever that is reasonably necessary as a means of exercising an effective control of interstate and foreign commerce. *Southern Ry. Co.* v. *United States*, 222 U. S. 20 (1911); *Minnesota Rate Cases*, 230 U. S. 352 (1913); *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197 (1938); *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937). As the Circuit Court of Appeals said in the *Diamond* case[1]:

> "It seems to us that the privacy to be achieved by the mandate of the statute is the privacy of a conduit or instrumentality of interstate communication, though the same physical equipment may likewise be the means by which intrastate communications are made. The broad scope and constitutional validity of statutes have been sustained where instru-

[1] See appendix to petitioners' brief on application for certiorari, page 29.

mentalities serve both interstate and foreign commerce, even when applied in specific instances to transactions which are not interstate commerce. So the Federal Safety Appliance Act as an exercise of Federal power under the commerce clause has been held to extend to all vehicles used upon a highway of interstate commerce whether the vehicles themselves are so engaged or not, for the safety to be secured by the Act is the safety of the persons transported in interstate commerce, no matter what may be the source of the dangers which threaten it. *Southern Ry. Co.* v. *United States*, 222 U. S. 20, 25, 26; *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, 41."

(e) Even if it could be said (as we think it cannot for the reasons just given) that the wire-tapping provisions of Section 605 exceeded the power of Congress in so far as they purport to prohibit the interception of intrastate communications, it is clear that those provisions are valid in so far as they embody a rule of evidence applicable in the Federal courts. In part, at least, the wire-tapping provisions of Section 605 embody such a rule of evidence by excluding the divulging in court of any intercepted communications or of any information thereby derived. *Nardone* v. *United States*, *supra*, 302 U. S. 379.

While, therefore, the wire-tapping provisions may be supported in accordance with their full literal construction, the petitioners are here obliged to support them only to the limited extent of upholding them as a rule of evidence in the Federal courts. The "separability" Section in the Act (Section 608) would afford the basis for upholding a partial validity of the wire-tapping provisions if that were necessary. The Section reads:

"If any provision of this act [chapter] or the application thereof to any person or circumstance is held

invalid, the remainder of the Act [chapter] and the application of such provision to other persons or circumstances shall not be affected thereby. (June 19, 1934, c. 652, §608, 48 Stat. 1105.)"

2. The purpose of the statute, as revealed by the evils which it was designed to remedy, shows that it applies to intrastate communications.

It is a fundamental rule of statutory construction that in determining the meaning of a statute, the particular evil which the act was designed to remedy is to be considered. As was said by Chancellor Kent (1 Kent's Com. Sec. 462), the intent with which statutes are enacted

> "is to be collected from the context, from the occasion and necessity of the law, from the mischief felt and the objects and the remedy in view".

It seems to us to be clear that the "mischief" which resulted in the enactment of Section 605 was the oppressive and destructive practice of wire-tapping, and that the "remedy" which Congress had in view was the abolition of this practice.

The pernicious nature of wire-tapping has been recognized by this Court. In *Nardone* v. *United States, supra*, this Court said (p. 384):

> "For years controversy has raged with respect to the morality of the practice of wire-tapping by officers to obtain evidence. It has been the view of many that the practice involves a grave wrong. In the light of these circumstances we think another well recognized principle leads to the application of the statute as it is written so as to include within its sweep federal officers as well as others."

Further, in answer to the Government's contention that Congress did not intend to impede the activities of the Government in the detection of crime, the Court said (p. 383):

> "Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same considerations may well have moved the Congress to adopt §605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution."

Although in the *Nardone* case interstate communications were involved, it is clear that in the passages quoted above this Court was concerned with the practice as a whole and with the interception of all communications regardless of their origin[1].

The practice was characterized by Mr. Justice Holmes, dissenting, in *Olmstead* v. *United States*, 277 U. S. 438, 470 (1928) as "dirty business". In that case also Mr. Justice Brandeis, dissenting, spoke of the practice as follows (p. 476):

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[1] The exact question before the Court in the *Nardone* case was stated as follows (p. 380):

> "The importance of the question involved,—whether, in view of the provisions of §605 of the Communications Act of (June 19) 1934, evidence procured by a federal officer's tapping telephone wires and intercepting messages is admissible in a criminal trial in a United States District Court,—moved us to grant the writ of certiorari".

The terms of the problem "as thus stated are broad enough to include the questions now presented". (*United States* v. *Pisco*, 22 Fed. Supp. 242, 243 (D. C. 1938) (holding that Section 605 applies to intrastate communications).)

> "The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. * * * As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping".

And further (p. 480):

> "To prove its case, the Government was obliged to lay bare the crimes committed by its officers on its behalf".

Condemnation of wire-tapping as "dirty business" and as an instrument of tyranny and oppression has not been confined to the opinions of the courts. Governor Lehman of New York has declared it to be:

> "One of the most vicious weapons that dictatorship invokes against individual rights * * *. It has been the vehicle of great oppression and persecution. It has caused people to be afraid of discussing their most intimate personal problems. * * * I am particularly concerned with the danger of wire-tapping. Today no one is safe from the menace of it".

The case at bar presents a striking illustration of the evils of wire-tapping, a significant demonstration of how wire-tapping may become the basis for perjury. Exhibit 209 is a wire-tap of a telephone conversation between defendants Berger and Messman, who testified for the Government (R. below 776). The conversation was held on February 19, 1937 and its substance was that the parties would meet at the office of petitioner Weiss in New York City on the following day, February 20th (R. below 776).

Both Messman and Berger testified that the meeting with petitioner Weiss was held on February 20th as arranged, and they testified at length to a particularly incriminating conversation which they claimed to have had with him on that day. In substance, they testified that on that occasion Messman and Berger executed a certain proof of claim (Ex. 210) in support of Berger's fraudulent claim for disability benefits. They testified that Weiss instructed Berger to use a different pen from that used by Messman (R. below 777) and that Weiss instructed Messman to date his portion of the document February 20th and instructed Berger to date his portion "two days ahead", i.e., February 22nd, lest the use of the same date look "funny and suspicious" (R. below 777). It was testified that the fact that "February 22nd was Washington's Birthday" was overlooked by all (R. below 777).

It was demonstrated at the trial that the testimony with respect to this incident was a complete fabrication. The Government finally conceded (R. below 1864), in the face of overwhelming documentary proof, that the petitioner Weiss was in Pinehurst, North Carolina on February 20th.

The significance of the incident for present purposes lies in the fact that the wire-tap enabled the witnesses to lend plausibility in the first instance to testimony which, as it turned out, was demonstrably false. Taking as a basis the wire-tap which showed that a meeting was actually planned for February 20th, they proceeded to invent a detailed story of a meeting on that day which, in fact, never occurred. But for the fact that by good fortune petitioner Weiss was able to prove an alibi, it is obvious that the credibility of the witnesses' false testimony would have been greatly enhanced by the wire-tap about which such testimony was woven.

Such are the evils of wire-tapping. It seems to us to be manifest that the purpose of Congress in passing Section

605 was to eradicate such evils and to eliminate a practice so destructive of personal liberty. As was said in *Sablowsky* v. *United States, supra* (p. 190):

> "Congress intended the provisions of Section 605 as remedial, and it is well established that statutes which are intended to be remedial in their nature are to be liberally construed".

And in *United States* v. *Plisco, supra,* the Court, referring to the opinion of this Court in *Nardone* v. *United States, supra,* stated (p. 244):

> "The Court treats the provision of Section 605 as remedial, the purpose being to eliminate a practice considered by many to involve 'a grave wrong'".

If we accept this analysis of the purpose of Congress, it is at once apparent that there is no sound basis for a distinction between intrastate and interstate communications. The ethical considerations which support the policy of preventing wire-tapping apply with as much force to one as to the other. It would indeed be illogical to claim that Congress had determined to attack the evil piecemeal, that it had intended to prohibit the interception and divulgence of a telephone message sent from New York City to Jersey City, and at the same time had intended to permit the interception and divulgence of a message sent from New York to Brooklyn. It is "not to be assumed that Congress intended divers and hostile rules for like situations" (*United States* v. *Plisco, supra,* at p. 244).

Judged in the light of its remedial purpose, a construction of the language of Section 605, which includes within its scope intrastate as well as interstate communications is, as the Court said in *Sablowsky* v. *United States, supra,* only "common sense". For, as the Court pointed out (p. 191):

"The ethical problem with which Congress was engaged and which it apparently sought to solve by enacting Section 605 is identical whether the communications intercepted and offered in evidence be interstate or intrastate in character. Nor would an interpretation of Section 605 commend itself to reason whereby certain intercepted communications could be received in evidence while others procured through the medium of an identical tapped line would be inadmissible".

It is submitted that this Court should resolve the conflict which has arisen among the various Circuit Courts of Appeals in construing the wire-tapping provisions of Section 605 by adopting the construction which gives effect to its language and which accords with the underlying purpose of the statute.

B. The interception and divulgence of the communications were not "authorised by the sender", within the meaning of Section 605.

The Government concedes that "This case would clearly be an appropriate one for review by this Court, except for a significant distinction between the instant case and the other pertinent decisions" (Br. opp'g. cert. p. 3). The asserted distinction is stated as follows (Id. pp. 4-7):

"In the prior cases involving the question, the contents of intercepted communications had been testified to by the Government agents who had intercepted them. In the instant case, however, none of the communications was divulged in court by the per-

> sons who intercepted them.* * * Each of these communications was admitted after it had been identified by at least one of the parties thereto. The parties identifying the communications were defendants who had pleaded guilty to the indictment. There is nothing in the instant record to indicate that the testimony of these witnesses was coerced or induced by promises of leniency. * * * Section 605 does not forbid the authorized publication of intercepted communications. * * * It would therefore seem that the word 'sender' as used in Section 605 should be so construed as to permit the divulging of a telephone conversation where either party thereto has sanctioned such divulging."

The Government made the same argument before the court below, but that court apparently deemed it too flimsy to merit attention. A brief consideration will disclose the insubstantial nature of the argument.

The communications in question were first intercepted under the supervision and control of Government agents (R. 64, 67). This interception was forbidden by Section 605. The Government does not pretend that this interception was sanctioned by any party to the communications.

Stenographers in the employ of the insurance companies listened to the intercepted communications. They took stenographic notes. Prior to the trial, as clearly appears from the case on appeal, records of the intercepted communications were played to the Government agents and to the United States attorneys. The records were stenographically transcribed and the transcripts were divulged to the Assistant United States attorneys. Thus, before there was any divulging in court, there was not only a prohibited interception but also a prohibited divulging to various persons. A divulging "to any person", in court or out of court,

is a prohibited divulging under Section 605, and "any person" means all persons as this court held in the *Nardone* case (*supra*, 302 U. S. 379). Were it not for this prohibited and unsanctioned interception and were it not for this prohibited and unsanctioned divulging of communications to the Federal agents by those who did the direct intercepting, the Government would not have had the proof in question.

Having obtained this material by violating the statute, the Government representatives proceeded to confront selected participants with the records of communications in which they had taken part. Under the manifest pressure of such a confrontation, the defendants Nelson, Berger, Spitz and Messman apparently decided to turn State's evidence. It was under these circumstances that these defendants, in advance of the trial, first "identified" the communications (Br. opp'g. cert. pp. 4-5) and apparently agreed to testify for the Government. The conclusion is inescapable that their agreement to testify and their testimony for the Government, if not induced by promises of leniency, were induced by hopes and expectations of leniency. Their expectations were realized. Messman's license to practice medicine was not revoked by any proceedings of the Government, and he continued to practice medicine with the knowledge of the United States Attorney (R. below 864). He was not required by the Government to plead to the indictment (R. below 596). He was paid by the Government (R. below 814). He has not been sentenced. Nelson was also paid a weekly stipend by the Government (R. below 365-6). His sentence was suspended; Berger's sentence was suspended; Spitz' sentence was suspended (R. 30).

The fact that Nelson, Berger, Spitz and Messman under these circumstances took the stand as witnesses for the Government and identified the intercepted communications is, we think, an extraordinary basis for the contention that

they thereby sanctioned or authorized the divulging of the communications.

(1) In the first place, their identification of the communications when confronted with the phonographic records was no authorization for the interception and divulging which preceded this confrontation. Yet, the statute requires authorization for both.

(2) In the second place, the identification of these communications in Court by the Government's witnesses, under the circumstances of this case, was in no proper sense an "authorization" to divulge, within the meaning of Section 605. At the very least, the statute must be held to contemplate a real consent, voluntarily given by the sender, to make use of the intercepted communication. It does not contemplate an acquiescence induced by fear of punishment, hope of leniency, and actual cash consideration.

In fact, the Government in this case did precisely what the statute forbade it to do. It tapped the wires and intercepted the communications without pretense of authority. It made records and transcripts of the conversations and divulged them freely during the course of its preparation of the case. Finally, after confronting certain of the participants with these conversations and inducing their admissions as to their identity, it divulged the communications to the Court and jury by introducing them in evidence. If this is "authorization" then the statute is virtually a nullity. All that the Government would need to do would be to tap the wires in plain violation of the statute in the hope that, by some measure or other, the parties to the conversation, after their arrest, might be induced to admit it. If such inducements were of no avail, the results of the interception could still be injected into the record under the guise of cross-examination, as was done in this case upon the cross-

examination of defendant Weiss with respect to conversations not in evidence (R. below 2000, 2003, 1963-9, 1908-25).

(3) Even if identification could be deemed the equivalent of authorization (as it clearly cannot), authorization by only one party to the communication would not constitute the authorization necessary under Section 605. Thirty-seven conversations introduced in evidence were identified by only one of the parties thereto, the other party being one of the petitioners. Thirty-eight conversations were identified by both parties thereto, both of them having testified for the Government (R. 129). The Government's contention is that since one of the parties to certain of the conversations pleaded guilty and testified for the Government he presumably authorized the disclosure of the conversations and that such authorization constitutes consent by the "sender" of the communication within the meaning of Section 605. The answer to such an argument is manifest. Each party to a telephone conversation is the "sender", with respect to his particular portion of the conversation. The statute was designed, as the Circuit Court of Appeals said in the *Diamond* case, to secure the privacy of the instrumentality and the communications passing over it. Its obvious purpose was to protect the communication and to protect each party to a conversation from its interception and disclosure without his consent. To permit such disclosure, solely upon the consent of the other party to the conversation, is in effect to nullify the statute. We think it clear that authorization, in the sense intended by the statute, was completely lacking in the present case.

POINT II.

The evidence derived from intercepted telephone communications was inadmissible because obtained and received in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

In contending that the admission of the intercepted communications violated the Fourth and Fifth Amendments to the Constitution we are frankly asking the Court to reconsider and overrule its decision in *Olmstead* v. *United States*, 277 U. S. 438 (1927), in so far as its force has not already been impaired by the decision in the *Nardone* case (*supra*, 302 U. S. 379). This Court held in the Olmstead case, by a 5 to 4 decision, that the interception of telephone messages by wire-tapping was not an illegal search and seizure, within the meaning of the Fourth Amendment, and that a defendant against whom evidence had been obtained by such means was not compelled to be a witness against himself within the meaning of the Fifth Amendment.

The Fourth Amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Fifth Amendment provides that "No person * * * shall be compelled in any criminal case to be a witness against himself".

Under the construction adopted by the majority of this Court, in the *Olmstead* case, *supra*, the application of the Fourth Amendment was limited to searches and seizures of physical objects, and it was said that there was no justifi-

cation for enlarging the language "beyond the possible practical meaning of houses, persons, papers, and effects," or so to apply the words "search and seizure as to forbid hearing or sight" (p. 465).

On this basis, for instance, this Court distinguished *Ex parte Jackson*, 96 U. S. 727 (1877), where the Fourth Amendment, "as a principle of protection", was deemed to apply to sealed letters and packages in the mail, so that "the unlawful rifling by a Government agent of a sealed letter is a search and seizure of the sender's papers or effects". By way of distinction, it was asserted that in the case of wire-tapping there is no search and no seizure. With particular reference to the telephone, this Court said (p. 465):

> "By the invention of the telephone, fifty years ago, and its application for the purpose of extending communications, one can talk with another at a far distant place. The language of the Amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched."

and further (p. 466):

> "The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment. Here those who intercepted the projected voices were not in the house of either party to the conversation."

With all due respect, we find it difficult to believe that this should stand as the appropriate language of constitutional interpretation, particularly as applied to the broad principles intended to be served by the bill of rights. Is it a prohibited search and seizure to abstract a message from the paper used to carry a written communication but not from a wire used to carry a spoken message? Is it really the "reasonable view" that the person who installs a telephone in his house "intends to project his voice to those quite outside" and along the "wires beyond his house",—or is it the reasonable view that one who taps a telephone wire on the outside is using a peculiarly offensive method of projecting himself into the house of the person using the telephone? Certainly, the ordinary person, using a telephone in the privacy of his house, does not regard himself as broadcasting his communication for the benefit of all members of the public within reach of the telephone wires.

Urgently as we request this Court to re-consider the *Olmstead* decision, however, we refrain from re-arguing at length the merits of the controversy there presented. It would, we think, be difficult if not impossible to add to the presentation of the opposing view as set forth in the dissenting opinions. (Id., pp. 469-488).

POINT III.

The evidence derived from intercepted telephone communications was inadmissible because obtained in violation of State Statute.

Quite apart from Section 605 of the Federal Communications Act and from the Fourth and Fifth Amendments, it is to be noted that wire-tapping is prohibited by statute in

New York. Section 1423 of the Penal Law (Consolidated Laws, chap. 40) provides that:

"A person who * * *

* * * * *

6. * * * shall unlawfully and wilfully cut, break, tap, or make connection with any telegraphic or telephone line, wire, cable or instrument, or read or copy in any unauthorized manner any message, communication or report passing over it, in this state; * * * or who shall aid, agree with, employ or conspire with any person or persons to unlawfully do, or permit or cause to be done, any of the acts hereinbefore mentioned, or who shall occupy, use a line, or shall knowingly permit another to occupy, use a line, a room, table, establishment or apparatus to unlawfully do or cause to be done any of the acts hereinbefore mentioned; * * *

* * * * *

is punishable by imprisonment for not more than two years."

The court below erroneously stated in its opinion (R. 119) that "No law of New York prohibited obtaining messages by wire-tapping". It may be added that the New York Statute above quoted was cited by Mr. Justice Brandeis in his dissenting opinion in the *Olmstead* case in listing the states in which it is a criminal offense to intercept a message sent by telegraph or telephone (277 U. S. 438, 479-480).

In *Olmstead* v. *United States*, *supra*, the court recognized that evidence obtained by wire-tapping in violation of state

statute (Id. p. 468) was evidence procured by the criminal act of agents of the United States. Nevertheless, the majority of the court held that the evidence obtained by such means was admissible under the general common-law rule "that the admissibility of evidence is not affected by the illegality of the means by which it was obtained" (Id., p. 467). With respect to the Washington statute there violated the court said (p. 469): "This statute does not declare that evidence obtained by such interception shall be inadmissible, and by the common law, already referred to, it would not be".

In refusing to recognize any further exception to the general common-law rule, this Court said (Id., p. 468):

> "A standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore."

While "nice ethical conduct" in the acquisition of evidence is doubtless too high a standard, there would seem to be forceful reasons for holding that the acquisition of evidence by means of direct violation of valid federal or state statutes should not be tolerated by the Courts. Assuming that the violation of the statute should not be tolerated, it is clear, to adapt the language applied by this Court to the protection of the Fourth Amendment (*supra* p. 18), that the protection of a valid statute would be much impaired unless it was held that not only was the official violator of the statute subject to action at the suit of the injured defendant, but also that the evidence thereby obtained could not be received.

While a majority of this Court refused to recognize such an additional or broadened exception to the general common-law rule, the dissenting Justices rendered a vigorous protest.

Mr Justice Holmes said in his dissenting opinion (p. 469-470):

> "But I think, as Mr. Justice Brandeis says, that apart from the Constitution the Government ought not to use evidence obtained and only obtainable by a criminal act. * * * We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part. * * * If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed" (*Olmstead* v. *United States*, 277 U. S. 438 at pp. 469-70).

Since the decision in the *Olmstead* case, there has been a rising tide of public opinion against wire-tapping by Federal officers, an opinion which this Court has noted (*Nardone* v. *United States*, 302 U. S. 379, 384).

It has been suggested that the *Nardone* decision has overruled *Olmstead* v. *United States*, *supra*, on this point. See dissenting opinion of Judge Morton in *Valli* v. *United States*, 94 F. (2d). 687. While such a reading of the *Nardone* case may involve an extension of the language of the opinion beyond the point actually decided, it may safely be said that this Court in the *Nardone* case has recognized the unethical quality and the practical dangers of wire-tapping and has thus approved a point of view wholly at variance with that of the majority of the Court in the *Olmstead* case, a point of view which must ultimately lead to the elimination of the evils which the practice embodies.

Petitioners urge that the position maintained by the dissenting justices in *Olmstead* v. *United States* should be adopted by this Court and that the *Olmstead* case should be definitely overruled. Wholly apart from the effect of the

Federal Communications Act and the effect of the Fourth and Fifth Amendments, it lies within the power of this Court to lay down common-law rules of evidence for the conduct of criminal trials in the Federal courts. As Mr. Justice Holmes said in the *Olmstead* case:

> "There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules" (*Olmstead* v. *United States*, 277 U. S. 438, 470).

We ask this Court to give effect to the point of view which it recognized in the *Nardone* case and to declare, once and for all, that the crime of Federal officers shall not be tacitly condoned by the Federal courts and that evidence obtained as the fruits of such crime shall not be admissible in a Federal criminal trial.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed because of the admission of concededly prejudicial evidence obtained in violation of Federal and State law and in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

New York, N. Y., Sept. 18, 1939.

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No. 42

Supreme Court of the United States

OCTOBER TERM—1939

JOSEPH J. WEISS, MARTIN GROSS, DR. GEORGE KRUPP and DR. MAXIMILIAN GOLDSTEIN,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONERS.

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Supreme Court of the United States

OCTOBER TERM—1939

JOSEPH J. WEISS, MARTIN GROSS, DR. GEORGE KRUPP and DR. MAXIMILIAN GOLDSTEIN,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONERS.

POINT I.

Wiretapping provisions of Section 605 apply to intrastate as well as interstate communications.

A. The Language of the Statute shows that it applies to intrastate communications.

The Government attempts to base its argument against the adoption of the construction of the statute advocated by petitioners both upon the context of provisions of the Communications Act other than Section 605 (Govt. Br. pp. 16-20) and upon the language of Section 605 itself (Govt. Br. pp. 20-25). The first branch of the argument has, for the most part, been anticipated and refuted in petitioners' main brief (pp. 15-18). One additional refinement may be noted. The Government argues (Govt. Br. pp. 18-19) that the failure of Section 3 of the Act (Title 47 U. S. C. §153) to define the

word "communication" in some way indicates that that word, as used in Clause 2 of Section 605, refers only to interstate communications. The argument is faulty in its premise as well as in its conclusion. It may be noted that Section 3 of the statute specifically defines "wire communication" and "radio communication". Inasmuch as these are the only "communications" with which the statute is concerned, it would seem to follow that the word has been sufficiently defined for the purposes of the statute. In any event, failure to provide any additional definition of the word "communication" can have no possible bearing upon the scope of that term as used in Section 605.

Furthermore, it appears that the Government has wholly failed to answer petitioners' argument (Pet. Br. pp. 17-18) to the effect that, granting that the primary purpose of the statute is to protect interstate and foreign communications, it is, nevertheless, obvious that such communications cannot be effectively protected without also prohibiting the interception and divulgence of all communications regardless of their origin. The Government's attempted answer (Govt. Br. pp. 32-35) is that Clause 2 of Section 605 in reality prohibits only "divulging" of intercepted communications and that, as thus construed, it is unnecessary to include intrastate communications within the scope of the prohibition in order effectively to protect interstate communications. Such a contention is manifestly unsound. Not only is a prohibition against divulging in fact necessary in order to accomplish complete protection (Pet. Br. p. 18), but, more important, it would seem to be clear beyond argument that the statute prohibits not only divulging but interception as well. Reference by the Government to the different language of earlier statutes and regulations (Govt. Br. pp. 33-35) cannot alter this conclusion.

With regard to the meaning to be derived from a construction of the language of Section 605 itself, the Govern-

ment's Brief (p. 22) advances certain arguments which seem to us to fall short of the mark. Thus, the Government contends that petitioners' construction of the Section would lead to the result that the interceptor of an intrastate communication is not forbidden to use the information for his own benefit. In the first place, such a result would not follow, inasmuch as Clause 4, which relates to intercepted communications, specifically prohibits such use. In any event, even if this were not the case, it is apparent that the result which the Government has presupposed is in no sense peculiar to petitioners' construction but would be equally applicable to the construction which the Government adopts. Thus, even if Clause 2 of Section 605 related only to interstate communications, as the Government contends, it would still be equally true, on the Government's premise, that an interceptor of interstate communications would not be forbidden to use the information for his own benefit. Clause 3 would not prevent such use, since that Clause does not relate to intercepted communications. Hence, the result, as far as the use of communications for the interceptor's own benefit is concerned, would be the same, regardless of the scope of Clause 2.

Similarly unsound is the Government's contention that petitioners' construction would lead to the conclusion that, although an employee of a transmitting agency is not forbidden to use or publish intrastate communications (Clause 1 being limited to interstate and foreign communications), nevertheless, a person "having become acquainted" with the contents of such a communication from an employee would be prohibited from using or publishing it under Clause 4. Such a result would not follow inasmuch as Clause 4 in terms refers only to persons who have become acquainted with the contents of "intercepted" communications. Hence, the provisions of Clause 4 are in no way related to, or inconsistent with, the provisions of Clause 1 relating, not to in-

terception, but to divulging by employees of transmitting agencies.

Finally, the Government contends that the failure to use the limiting words "interstate and foreign" in Clause 2 of the Act was caused by the fact that the draftsman of the Act "evidently believed" that the use of those words in Clause 1 carried over to Clause 2 (Br. p. 24). Obviously, if this were so, the draftsman would not have repeated the phrase "interstate and foreign" in Clause 3, but would have assumed that that phrase carried over, not only to Clause 2, but throughout the Section. The fact of significance is that the draftsman did not rely upon any such "carry over" principle but specifically inserted the phrase of limitation in the Clauses which do not deal with interception and refrained from using such limitation in the Clauses which do deal with that subject.

B. The Government's argument based upon the "legislative history" of Section 605 is beside the point.

This argument comes down to the contention that the purpose of Congress in passing the Communications Act of 1934 was merely to transfer to the newly created Federal Communications Commission the authority over wire and radio communications which had previously been vested in part in the Federal Radio Commission and in part in the Interstate Commerce Commission. If this were so, it would, of course, follow that the statute was not intended to deal with the subject of wiretapping at all, regardless of the nature of the communications intercepted. But, this Court, in the *Nardone* case, held exactly to the contrary. In fact, this Court there expressly rejected the Government's similar argument based on legislative history holding that "these circumstances are, in our opinion, insufficient to overbear the plain mandate of the statute" (*Nardone* v. *United States*, 302 U. S. 379, 382-3).

Furthermore, it is worthy of note that the Government's brief wholly ignores the one factor in the history of Section 605, which seems to us to have any real importance. Section 27 of the Radio Act of 1927, upon which the present Section 605 was based, nowhere contained the limiting phrase "interstate or foreign". In drafting the present statute, on the contrary, this phrase was inserted in Clauses 1 and 3 of the Section and omitted from Clauses 2 and 4 (See Petitioners' Br. p. 19).

C. Petitioners' construction of Section 605 would not render the statute unconstitutional.

Although the Government suggests, without arguing the point, that petitioners' construction would be of doubtful constitutionality (Govt. Br. p. 42), it would appear that the Government has nowhere attempted to answer petitioners' argument (Pet. Br. p. 21) which would seem to be conclusive upon the constitutional point, namely, that Congress may regulate intrastate commerce whenever that is reasonably necessary as a means of exercising effective control of interstate and foreign commerce.

Furthermore, the Government has not refuted petitioners' contention (Pet. Br. p. 22) that the Section could be sustained in any event as embodying a rule of evidence for the Federal courts. The Government argues (Govt. Br. p. 35) that the *Nardone* decision does not establish that the Section constitutes "a rule of evidence *per se*". And, yet, at the same time, the Government admits that the "effect of the decision of this Court in the *Nardone* case was to render inadmissible in a Federal criminal prosecution interstate telephone communications intercepted by Federal officers" (p. 35). The distinction, if any exists, seems too fine. By "rule of evidence" we mean merely a rule which renders evidence inadmissible. The *Nardone* case, as we understand it, held squarely that Section 605, in effect, creates such a rule.

D. The purpose of the statute, as revealed by the evils which it was designed to remedy, shows that it applies to intrastate communications.

We find no passage of the Government's brief which directly attempts to answer this argument, set forth on pages 23-28 of petitioners' brief. It is indeed suggested in another connection (Govt. Br. p. 48) that although wiretapping is susceptible of abuse, nevertheless, "the individual cannot isolate himself from a minimum of social supervision". We deem it unnecessary to elaborate upon the dangerous implications of such an argument.

POINT II.

The interception and divulgence of the communications were not "authorized by the sender".

The Government's argument on this point (Govt. Br. pp. 43-46) has already been anticipated and refuted in petitioners' main brief (pp. 28-32). It may be pointed out that the Government's argument is based upon the fundamental misconception heretofore noted, namely, that Section 605 is directed only against divulging and not against interception as such. Obviously, if this premise be unsound, as we believe it is, the entire argument falls without need of further discussion, inasmuch as it cannot even be contended by the Government that the original interception of the conversation was authorized by either party to them.

It may also be noted for the sake of completeness that the Government's contention that one party to the conversation shall be deemed to be the "sender" depends upon the argument that at common law either party to a conversation may testify to it without the consent of the other. Obviously, this common law principle has no bearing upon the interpretation of the word "sender" as used in the statute.

Finally, it should be observed that the Government's argument in this connection cannot apply in any event to Exhibit 307, a conversation the interception and divulgence of which, the Government concedes (Govt. Br. p. 45), was not authorized by either party thereto. This conversation happens to be the only one between two of the petitioners. For this reason, as well as because of its contents, its importance may not be minimized. It was apparently deemed sufficiently weighty to justify its use among the thousands available, and the Government may not reasonably argue now that it should be overlooked.

POINT III.

The evidence derived from intercepted telephone communications was inadmissible because obtained and received in violation of the Fourth and Fifth amendments to the Constitution of the United States.

Here the Government relies in the main upon the majority view in the *Olmstead* case, whereas petitioners have urged that this Court now adopt the views there expressed by the dissenting justices. One or two statements in the Government's brief deserve mention here. Thus, it is manifestly inaccurate to contend (Govt. Br. p. 50) that "The *Nardone* decision itself embodies a reaffirmation of the holding in the *Olmstead* case". The Nardone decision neither reaffirms nor repudiates the doctrine of the *Olmstead* case since in the *Nardone* case the Court was concerned solely with the construction of Section 605.

The two cases cited by the Government (p. 49) with reference to the question of search and seizure are not in point here. Thus *Agnello* v. *United States*, 269 U. S. 20 (1925) was a case in which the conviction of the defendant for con-

spiracy to violate the Federal Narcotic Act was reversed on the ground that evidence had been improperly admitted because it had been obtained through an illegal search of the defendant's home without a warrant, in violation of the Fourth Amendment. The holding of the case therefore, if relevant at all, would seem to support the petitioners', rather than the Government's, contention.

United States v. *Lee*, 274 U. S. 559 (1927) involved primarily the question of whether Federal officers may legally apprehend an American vessel on the high seas. The question of illegal search and seizure was only briefly referred to by the Court in holding that no such question was presented inasmuch as the Federal officers had not searched the vessel but had merely looked at it from the deck of a Government vessel. The fact that in order to see it was necessary to use a light, inasmuch as the incident occurred at night, is of no significance. The situation was in no way analogous to that presented by a case of wiretapping in which Federal officers have, in effect, projected themselves within a defendant's home.

Mention may also be made of the Government's argument, which we feel to be somewhat strained, to the effect that the including of wiretapping within the ban of the Fourth and Fifth Amendments would render it impossible for Congress in the future to permit that practice to any extent, even under proper safeguards. Such a question goes far beyond the scope of the present case and need not be here decided, but it would seem that, viewed as an abstract proposition, it would be entirely possible for Congress to amend the statute to permit wiretapping by Federal officers, if it so desired, under proper requirements as to the obtaining of a warrant, etc. Indeed, as the Government itself points out, a bill to that effect has already been considered by Congress (Govt. Br. pp. 38-9).

POINT IV.

The challenged testimony was not admissible if the Federal Communications Act or the Fourth and Fifth amendments be construed to bar introduction into evidence of intercepted intrastate telephone communications.

The Government makes a belated attempt (Br. pp. 59-63) to avoid the entire issue as to the construction to be given to the Communications Act and the Fourth and Fifth Amendments by contending that such questions are not presented by this record since "the witnesses who testified to the telephone communications at the trial were parties to the conversations" (p. 60). It is said that the admission of such testimony may be justified on common law principles either on the theory that it constituted a refreshing of the witnesses' recollection or on the theory that the records and transcripts constituted a memorandum of past recollection recorded. Such an argument completely ignores the theory upon which the evidence was offered and received at the trial. What actually occurred is briefly as follows:

The witness Nelson was first shown Government's Exhibit No. 110 for identification, a stenographic transcript of a telephone conversation had between Nelson and Mrs. Messman (R. 33-5). The witness testified that he had heard a phonographic record of that conversation played to him outside of Court and that he had corrected the stenographic transcript of the conversation, where necessary, to conform to the phonographic record (R. 35). The witness then testified in response to questions by the Court that although he could give the substance of the conversation from memory, without reference to the transcript, he could not give the conversation word for word (R. 36). Thereupon, over objection and exception of defense counsel, the Court permitted the witness to testify to the precise words of the conversation, "refreshing

his recollection" from the stenographic transcript (R. 44). In fact, the Court, in effect disregarding the fiction of "refreshing", directed the witness to read the transcript word for word to the jury (R. 44).

Thus far it might possibly be said, as the Government contends, that in pure theory, such testimony consisted of the witness's own recollection of the conversation, as "refreshed" by an unidentified paper. It is unnecessary to argue the point, however, for the fact of cardinal importance is that the Government did not follow the same procedure with respect to all the other intercepted conversations which it introduced.

Immediately after the incident just described, the Government offered in evidence a phonographic record and corresponding stenographic transcript of a totally different conversation, one between Nelson and Dr. Messman held on January 9, 1937 (R. 46). In this instance, the Government made no attempt to pursue the fiction of refreshing the witness's recollection as to the contents of the conversation. The witness was not even asked whether he could recall the substance of the conversation, let alone the precise words (R. 54-5). He testified merely that he had heard the phonographic record played and corrected the stenographic transcript to correspond to it (R. 54-5). Both the transcript and the phonographic record were then offered in evidence and upon the objection of defense counsel that no foundation had been laid, inasmuch as the witness had not testified that he did not recall the substance of the conversation independently of the documents (R. 55), the Assistant United States Attorney stated:

> "I do not have to ask him that. I am not offering it on that theory. I am offering it on the theory that is *independent corroboration*". (Italics ours.)

Petitioners' objection was thereupon overruled and both the phonographic records and the stenographic transcript were admitted (R. 55-6).

The same method was followed with respect to each of the 75 remaining conversations. In each instance the witness merely testified that he had "followed the same procedure", that is to say, that he had heard the record played to him and had compared it with the stenographic transcript.

It thus appears that this evidence was not offered or received on the theory that it either refreshed the recollection of the witness or recorded a transaction which he had originally known but as to which he had no present recollection. It was offered as "independent corroboration" of the witness's testimony as to his transactions with the defendants. It is simply not true that the testimony was "the testimony of the witness" or that its weight depended "on his credibility" (Govt. Br. p. 62). The phonographic records and transcripts constituted independent evidence in precisely the same manner as if they had been identified, not by a witness who said he had heard them played outside the courtroom, but by the Federal officer who intercepted the communications and by the persons who prepared the phonographic records and transcripts. Moreover, the Government called as witnesses, the officers who had intercepted the conversations and prepared the records, and they testified in detail as to the exact procedure followed (R. 64-92). There cannot be the slightest doubt that everyone in the courtroom, court, jury and counsel on both sides, understood that evidence was being introduced of telephone conversations, which had been intercepted by means of wiretapping, and that the authenticity of such evidence depended upon the accuracy of the methods employed in intercepting the conversations and recording them both mechanically and stenographically. Counsel for the Government claimed as much in his summation (R. below 2510). No one present could have conceived for one moment that the testimony consisted merely of the recollection of a party to the conversation or that the records consisted merely of a memorandum of his previous recollection.

Moreover, wholly apart from the foregoing, such use of the records of the intercepted communications was clearly a violation of Clause 4 of Section 605, which prohibits any person "having received such intercepted communication or having become acquainted with the contents" thereof to divulge or publish it or "use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto".

The admission of this evidence squarely raised the questions of the construction to be given to the Communications Act and the Fourth and Fifth Amendments. To contend otherwise is merely a belated and fallacious effort to avoid consideration of those important questions on their merits.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed because of the admission of concededly prejudicial evidence obtained in violation of Federal and State Law and in violation of the Fourth and Fifth amendments to the Constitution of the United States.

New York, November 9, 1939.

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No. 42

In the Supreme Court of the United States

OCTOBER TERM, 1938

JOSEPH J. WEISS, MARTIN GROSS, DR. GEORGE KRUPP, AND DR. MAXIMILIAN GOLDSTEIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 939

JOSEPH J. WEISS, MARTIN GROSS, DR. GEORGE KRUPP, AND DR. MAXIMILIAN GOLDSTEIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

1. Of the questions raised by the petition for writ of certiorari and supporting brief, the only one which may be of sufficient general importance to warrant review by this Court is that relating to the admissibility in evidence, under Section 605 of the Federal Communications Act of June 19, 1934, c. 652, 48 Stat. 1064, 1103 (U. S. C., Title 47, Sec. 605) of some 76 intrastate telephone communications [1] which had been intercepted under the super-

[1] See discussion, page 7, *infra*, with reference to one of these communications. Petitioners also refer to three other intercepted intrastate communications but admit that the

vision of Government officers by means of tapped telephone wires. (R. 560, 563, 586–588.) The Circuit Court of Appeals was of the opinion that if the intercepted messages were improperly admitted, each of the petitioners was prejudiced, and the Government does not dispute that this is so if all of them were inadmissible.

The Circuit Court of Appeals held that the admission of these telephone communications was not prohibited by Section 605 of the Federal Communications Act;[2] that this statute applies only to interstate and foreign communications and not to intrastate communications; and that the decision of this Court in *Nardone* v. *United States,* 302 U. S. 379, dealt only with the admissibility in evidence of interstate communications. The court recognized that its holding was in conflict with the decisions of the Circuit Court of Appeals for the Third Circuit in *Sablowsky* v. *United States,* 101 F. (2d) 183, and the Circuit Court of Appeals for the Sixth Circuit in *Diamond* v. *United States* 94 F. (2d) 1012.[3]

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contents of those were not introduced in evidence. They were used merely for the purpose of refreshing the recollection of the petitioner Weiss on cross-examination and no objection was made to their utilization for that purpose (R. 1908–1925, 1965–1969, 2000–2003).

[2] The pertinent portion of Section 605 reads as follows: "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person".

[3] The conflict does not clearly appear from this opinion, but see the unreported opinion of April 16, 1938, denying a petition for rehearing by the Government, quoted at pages 28–30 of the petition for writ of certiorari herein.

See also *United States* v. *Plisco*, 22 F. Supp. 242 (U. S. D. C. Dist. of Col.). The court chose, however, to follow the decision of the Circuit Court of Appeals for the First Circuit in *Valli* v. *United States*, 94 F. (2d) 687.[4] To the same effect is an unreported decision of the District Court for the Eastern District of Missouri in *United States* v. *Bianco*, decided January 13, 1938.

In view of this conflict of decisions on the question of the admissibility in evidence of intercepted intrastate communications under Section 605 of the Communications Act,[5] this case would clearly be an appropriate one for review by this Court, except for a significant distinction between the instant case and the other pertinent decisions which was presented by the Government in its argument in the court below but which that court found it unnecessary to discuss in view of its hold-

[4] In this case this Court on March 28, 1938, granted a petition for writ of certiorari (303 U. S. 632), but on May 31, 1938, the writ was dismissed on motion of counsel for the petitioners (No. 814, October Term 1937).

[5] Even if the provisions of Section 605 in question be deemed applicable to intrastate communications, there may arise the question whether Congress had the constitutional authority to make them so applicable. In the unreported decision in the *Bianco* case, *supra*, it was said that: "It is our opinion that the second clause of Section 605 * * * relates only to interstate communications, and had Congress attempted to make such clause applicable to intrastate communications it would have been invalid." Cf., however, the unreported opinion denying the petition for rehearing in the *Diamond* case, *supra*.

ing that, the communications being intrastate, their admission in evidence was not forbidden by Section 605. In the prior cases involving the question, the contents of intercepted communications had been testified to by the Government agents who had intercepted them. In the instant case, however, none of the communications was divulged in court by the persons who intercepted them. The record discloses that both of the parties to 38 of the intercepted communications testified for the Government.[1] One of the two parties to 37 of the communications likewise testified.[2] Each of these

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[1] Ex. 110, R. 227–229, 284, 2833–2834; Ex. 118, R. 280–282; Ex. 119, R. 280–282, 745–747, 2840–2849; Ex. 121, R. 299, 749; 2852–2853; Ex. 122, R. 287–288, 2854–2855; Ex. 123, R. 288–290, 755, 2856–2857; Ex. 124, R. 290, 759, 2858–2860; Ex. 125, R. 291, 762, 2861–2863; Ex. 126, R. 292–293, 768, 2864–2866; Ex. 127, R. 293–294, 768, 2867; Ex. 128, R. 294–297, 2868; Ex. 133, R. 299, 791, 2871; Ex. 147, R. 315, 815, 2888; Ex. 149, R. 318, 815, 2890; Ex. 153, R. 324, 821, 2897; Ex. 162, R. 331, 832, 2904–2907; Ex. 169, R. 341, 843, 2915–2916; Ex. 202, R. 760, 2990–2991; Ex. 203, R. 764–765, 1467–1468, 2992–2994; Ex. 208, R. 772, 1469–1470, 3001–3002; Ex. 209, R. 776, 1471, 3003–3004; Ex. 211, R. 779, 3006–3007; Ex. 213, R. 784–785, 1482, 3009–3010; Ex. 217, R. 790, 3015; Ex. 219, R. 792, 1163–1164, 3017–3019; Ex. 222, R. 797, 1485, 3021; Ex. 229, R. 808–809, 1179, 3033; Ex. 232, R. 819, 1490, 3036; Ex. 236, R. 827, 1196, 3039–3041; Ex. 237, R. 828, 3042; Ex. 240, R. 831, 3047–3049; Ex. 276, R. 1175–1176, 3069–3070; Ex. 278, R. 1182, 3072; Ex. 279, R. 1183, 3073–3074; Ex. 285, R. 1189–1190, 3076–3077; Ex. 351, R. 1487–1488, 3153; Ex. 353, R. 1493, 3155; Ex. 354, R. 1493, 3156.

[2] Ex. 120, R. 748, 2850–2851; Ex. 138, R. 305–307, 2874–2875; Ex. 140, R. 309, 2877–2878; Ex. 141, R. 311, 2879; Ex. 142, R. 312, 2880–2883; Ex. 144, R. 313, 2885; Ex. 145, R. 314, 2886; Ex. 146, R. 315, 2887; Ex. 148, R. 318, 2889; Ex.

communications was admitted after it had been identified by at least one of the parties thereto.[8] The parties identifying the communications were defendants who had pleaded guilty to the indictment.[9] There is nothing in the instant record to indicate that the testimony of these witnesses was coerced or induced by promises of leniency. Indeed the record reveals otherwise (R. 112, 596, 1127, 1408, 2577). Section 605 does not forbid the authorized publication of intercepted communications. It provides that "no person *not being authorized by the sender* shall intercept any commu-

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150, R. 320, 2891–2892; Ex. 151, R. 323, 2893–2894; Ex. 152, R. 324, 2895–2896; Ex. 154, R. 324–325, 2898; Ex. 155, R. 325, 2899; Ex. 156, R. 325, 2900–2901; Ex. 163, R. 335–336, 2908; Ex. 164, R. 336, 2909; Ex. 165, R. 338, 2910; Ex. 166, R. 339–340, 2911; Ex. 167, R. 340, 2912–2913; Ex. 168, R. 340, 2914; Ex. 170, R. 341–342, 2917–2918; Ex. 200, R. 750, 2987–2988; Ex. 206, R. 769, 2998–2999; Ex. 212, R. 783–784, 3008; Ex. 214, R. 786, 3011; Ex. 218, R. 791, 3016; Ex. 220, R. 793, 3020; Ex. 228, R. 805–806, 3032; Ex. 230, R. 809, 3034; Ex. 231, R. 810, 3035; Ex. 277, R. 1180, 1268, 3071; Ex. 286, R. 1190–1191, 3078–3079; Ex. 287, R. 1192, 3080–3081; Ex. 288, R. 1193, 3082; Ex. 292, R. 1199, 3086–3087; Ex. 361, R. 1509, 3162.

[8] Each communication was introduced either by reading to the jury a stenographic transcript thereof or by playing upon a phonograph in open court a recording of the communication. Prior to the trial a recording of each of the communications was listened to by the party identifying the communication at the trial. This party would compare the stenographic transcript with the record and would correct the former to conform with the latter. See record references in footnotes 6 and 7, *supra*.

[9] Defendants Messman, Nelson, Berger, and Spitz (R. 34; see also opinion of the court below, p. 2).

nication *and divulge or publish*" the existence, etc. of such intercepted communication to any person. (Italics ours.) It is evident, therefore, that the section permits the divulging of intercepted communications if the "sender" has authorized such divulging. Obviously, the word "sender" was not an apt word to use in connection with telephone conversations. It applies rather to telegraphic and other like communications. The provision in question was taken from Section 27 of the Radio Act of 1927 (Act of February 23, 1927, c. 169, 44 Stat. 1162, 1172). The only change made was the substitution of the word "communication" for the word "message." It is apparent therefore that the word "sender" was used in the Radio Act of 1927 in connection with one-way communications. The present Act applies not only to such communications but also to two-way communications such as telephone conversations, in which two parties are essential to the communication. Both logically and practically the word "sender" as applied to telephone conversations would seem to be without meaning unless it applies to either party to such a communication. That neither party has an exclusive right or property in a telephone conversation is supported by the fact that, irrespective of any question of interception, either party to such a communication could undoubtedly testify as to its substance or purport without the consent of the other. It would therefore seem that the word "sender" as used in Section 605 should be so construed as to permit

the divulging of a telephone conversation where either party thereto has sanctioned such divulging. If this is so, the divulging in court of 75 of the 76 intrastate communications was "authorized" within the meaning of Section 605.

The only intrastate communication [10] the divulging of which may not accurately be said to have been authorized by one of the parties thereto is Exhibit 307 (R. 3102–3103). This communication was between the petitioners Gross and Weiss. It was identified by the defendant Spitz, who, while in Weiss' office, overheard his end of the conversation and testified to what he heard (R. 1333–1335). Subsequently the exhibit was admitted during the cross-examination of the petitioner Gross over his objection (R. 2113–2114). While this communication related to fees to be charged by Weiss and indicated that Gross was a "runner" for Weiss, we submit that this single communication cannot be said to have been prejudicial to either Weiss or Gross since it is apparent from the opinion below that there was ample evidence, other than this communication, to establish the conspiracy and scheme charged and to connect both petitioners therewith (Op. pp. 8–9, 14).

2. The contentions of the petitioners that reversible error resulted from improper cross-

[10] While the petitioners assert that there was no showing that this communication was intrastate rather than interstate, it is apparent from the opinion of the court below and the holding of the District Judge in ruling upon its admissibility that the communication was, in fact, intrastate (Opinion below, p. 6; R. 2113–2114).

examination of several of them and of their character witnesses and from an improper summation by the United States Attorney, do not appear to be of sufficient general interest or importance to justify their review by this Court. The record discloses that whenever the occasion demanded the trial judge either sustained objections or admonished the jury that statements of counsel were not evidence and should be disregarded (R. 1767, 1774, 1902, 1978, 2092, 2122, 2132). He moreover gave a similar instruction in his general charge to the jury (R. 2595). The opinion below discloses that that court also gave consideration to these contentions and that, giving due heed to the decision of this Court in *Berger* v. *United States*, 295 U. S. 78, it concluded that none of the alleged errors warranted reversal.

3. With reference to the refusal of the trial judge to give a requested instruction regarding the statutory fees of Government witnesses, there was clearly no reversible error, since the requested charge obviously had no relevancy and in any event was sufficiently covered by that portion of the general charge respecting the interest of witnesses in the outcome of the case (R. 2594). Concerning the denial of the trial court of the motion of petitioner Gross to suppress certain documents as evidence (R. 57–58), all that need be said is that none of these documents was introduced in evidence. It is therefore apparent that neither of these latter con-

tentions is of sufficient importance to warrant certiorari.

4. We therefore ~~suggest~~ submit that if the disclosure in court of the 75 intrastate communications may be deemed to have been "authorized by the sender" within the meaning of Section 605, a review of the present case will not resolve the conflict of decisions involving the admissibility under that section of intercepted intrastate communications. If, however, certiorari should be granted, we respectfully suggest, in view of the unimportance of the other contentions urged by petitioners, that review be limited to the admissibility of these communications under Section 605, unless this Court desires to reexamine questions urged by the petitioners which were disposed of by it in its decision in *Olmstead* v. *United States*, 277 U. S. 438. If that is so, review should be confined, for the reason stated, to the admissibility of the communications.

Respectfully submitted.

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No. 42

In the Supreme Court of the United States

OCTOBER TERM, 1939

JOSEPH J. WEISS, MARTIN GROSS, DR. GEORGE KRUPP, AND DR. MAXIMILIAN GOLDSTEIN, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 42

JOSEPH J. WEISS, MARTIN GROSS, DR. GEORGE KRUPP,[1] AND DR. MAXIMILIAN GOLDSTEIN, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the trial court. The opinion of the Circuit Court of Appeals (R. 116–125) is reported in 103 F. (2d) 348.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 13, 1939 (R. 126). The petition for writ of certiorari was filed May 6, 1939,

[1] We are advised that the petitioner Dr. George Krupp has died since the granting of the writ of certiorari.

and granted June 5, 1939 (R. 126). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

This Court in granting the petition for writ of certiorari limited its review to the following question (R. 126):

Whether the trial court properly received in evidence intercepted telephone communications.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The principal statutory provision involved in this case is the second clause of Section 605 of the Communications Act of 1934, c. 652, 48 Stat. 1064, 1103–1104 (U. S. C., Title 47, Section 605). The section reads as follows, the clauses being set apart for the convenience of the Court:

Clause 1:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such

communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority;

Clause 2:

and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person;

Clause 3:

and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto;

Clause 4:

and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or

for the benefit of another not entitled thereto:

Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

Other pertinent constitutional and statutory provisions, referred to in this brief, are printed in Appendix A, *infra*, pp. 65–69.

STATEMENT

In the United States District Court for the Southern District of New York there was returned against the petitioners and others an indictment containing twenty counts. The first nineteen counts were based on the mail fraud statute (Section 215 of the Criminal Code; U.S.C., Title 18, Sec. 338) and alleged that petitioners and their co-defendants placed and caused to be placed letters in the United States Post Office in execution of a scheme to defraud life, health and accident insurance companies by inducing these companies to pay false and fraudulent claims on policies of insurance. It was charged in the indictment, in effect, that co-defendants Nelson, Berger and Spitz[2] were policyholders who filed false and fraudulent claims with insurance companies, representing that they

[2] These defendants pleaded guilty and testified for the Government (R. 116).

were permanently and totally disabled; that co-defendant Messman[3] and petitioners Krupp and Goldstein were physicians who manufactured fictitious histories, diagnoses and ailments for these claimants in support of their claims and who instructed them how to feign such ailments when examined by insurance company physicians; that petitioner Joseph J. Weiss and co-defendant Alfred L. Weiss[4] were attorneys who advised, counseled, supervised, and financed the fabrication and presentation of the false claims to the insurance companies; and that petitioner Gross was a "chaser" who sought out and brought to the law offices of the Weiss's the three claimants for the purpose of having them file false and fraudulent claims (R. 1–20). The twentieth count alleged a conspiracy to commit the crimes charged in the first nineteen counts, in violation of Section 37 of the Criminal Code (U.S.C., Title 18, Sec. 88) (R. 20–25).

With respect to the evidence the Circuit Court of Appeals in its opinion states (R. 120):

> There can be no doubt that the government offered sufficient proof to go to the jury on all the evidence submitted.
>
> It is not questioned that Messman, Spitz, Berger and Nelson were engaged in com-

[3] This defendant also pleaded guilty and testified for the Government (R. 116).

[4] Defendant Alfred L. Weiss obtained a severance during the course of the trial owing to illness (R. 116).

> mitting frauds upon insurance companies through the filing of false claims representing that Nelson, Berger and Spitz were disabled when in fact they were not. There likewise can be no doubt that each of the appellants [petitioners herein] assisted in promoting at least some of the claims against the insurance companies. The defendant Weiss assisted in all three cases, as did Gross. The defendant Krupp gave a medical certificate in the Spitz case, the defendant Goldstein gave a certificate in the Nelson case.

Petitioners were found guilty on all counts submitted to the jury.[5] Petitioners Weiss and Gross were sentenced to imprisonment for three years on each of the substantive counts and to two years on the conspiracy count, the sentences to run concurrently (R. 30, 108, 111). Petitioners Goldstein and Krupp were sentenced to imprisonment for a year and a day on each of the counts, the sentences to run concurrently (R. 30, 109–110, 112). The Circuit Court of Appeals for the Second Circuit unanimously affirmed the judgments of conviction (R. 116–126). This Court in granting the petition for writ of certiorari limited its review, as indicated, to the question "whether the trial court properly received in evidence intercepted telephone

[5] On motion of the Government counts eight and twelve were dismissed as to all petitioners and their co-defendants (R. 28). Counts nine, ten, eleven, and thirteen were dismissed as to petitioner Krupp upon his own motion (R. 29).

communications" (R. 126), which in the case at bar are solely intrastate communications.*

In view of this limitation, there are set forth the exact circumstances under which the challenged testimony was admitted. Benjamin Nelson, a defendant who pleaded guilty and testified for the Government, identified Government's Exhibit No. 110, a typewritten transcript, corrected and initialed by himself, of a telephone conversation to which he was a party (R. 33). He was then asked whether he had heard a phonograph recording of the same conversation (R. 33). As brought out by subsequent evidence the transcript and recording had been obtained at the direction and under the supervision of Federal officers by intercepting telephone communications of some of the defend-

*Seventy-five of the communications were admittedly intrastate (Pet. 2; Br. 3). While the petitioners assert, without argument, that evidence of one intercepted telephone communication (Government's Exhibit No. 307) was introduced without proof that it was intrastate (Br. 4), they do not contend that this communication was interstate. It is apparent from the opinion of the Circuit Court of Appeals and the holding of the District Judge, in ruling upon its admissibility, that the communication was, in fact, intrastate (Opinion below, R. 119; R. below 2113–2114).

Petitioners also refer (Br. 4) to three intercepted intrastate telephone communications which they assert were put before the jury in the form of questions of the prosecutor, but were not directly placed in evidence. (See Government's Memorandum in Opposition, Footnote 1, pp. 1–2.) It should be noted, however, that this Court in granting a writ of certiorari limited its review to the admissibility of communications which were received in evidence.

ants. Before the Government offered either transcript or recording in evidence defense counsel objected on the following grounds *inter alia*: That an effort was being made "to bolster this witness by a memorandum not in evidence" (R. 33), and that "the offer * * * to elicit this testimony" violated the Fourth and Fifth Amendments, Section 605 of the Federal Communications Act and Subdivision 6 of Section 1423 of the Penal Law of New York (R. 33–34). The court overruled the objections (R. 35, 38, 44). The witness then testified that the transcript was an accurate report of the conversation (R. 35). The prosecuting attorney offered the transcript in evidence (R. 35). There was an extended colloquy, at the conclusion of which the court expressed doubt as to the competence of the transcript except to refresh the witness' recollection (R. 40). However, after ascertaining that the witness did not independently recall the exact words of the conversation (R. 36), the court permitted him to read the transcript aloud "with his memory refreshed word for word" (R. 40, 44). Although this ruling was evidently based upon the theory that the transcript could be used to refresh the witness' recollection (R. 38, 40, 44, 58, 61), the subsequent admission into evidence of the transcript and record themselves (R. 58) was apparently upon the basis, although it is not entirely clear, that the record was a memorandum of past recollection recorded and that, in any event, intrastate communications were not within the purview

of Section 605 of the Communications Act (R. 33, 36, 37, 39–40, 46–47). It was agreed that the objections to Government's Exhibit No. 110 and the ruling thereon should apply to the subsequent admission of similar testimony (R. 53, 56, 58) and thereafter stenographic transcripts and phonograph recordings were introduced without rearguing the question. (See e. g., R. 56, 58, 60, 61, 64.)

In all, 76 telephone communications were received in evidence. Both parties to 38 of these communications testified for the Government; one of the two parties to 37 of the communications testified for the Government; and with the exception of one message (Government's Exhibit 307) each communication which was received in evidence was admitted only after it had been identified by at least one of the parties thereto, such parties being four of the defendants (Stipulation, R. 129). Of the petitioners, Weiss was a party to approximately 32 communications, Gross a party to 2 and Krupp a party to 3. Goldstein was a party to none of the communications. (See certified typewritten transcript, hereinafter called R. below, Vol. I, "List of Exhibits.") It has been stipulated in this Court that interstate telephone communications were transmitted over the same wires used in transmitting the intrastate telephone communicaions which were received in evidence (R. 129).

The only telephone wires tapped were those of petitioner Weiss and co-defendant Messman. They were tapped by an officer of the New York City

Police Department at the direction of a Federal officer without any trespass upon the premises of either Weiss or Messman (R. 64–65, 67, 75, 78, 88–89). All the conversations over these wires admitted in evidence were mechanically recorded and in addition were listened to by stenographers with earphones who made stenographic transcripts of the conversations (R. 68–69, 71–74, 82–83, 86–87, 90).

Prior to trial the recordings were played in the office of the United States Attorney to the witnesses who later testified respecting them. The witnesses then made corrections in the transcripts, after comparing them with the recordings as they were played, and initialed both records and corrected transcripts (R. 34–35, 48, 54, 59–61, 63–64).

SUMMARY OF ARGUMENT

I

In *Nardone* v. *United States*, 302 U. S. 379, this Court held that Clause 2 of Section 605 of the Communications Act of 1934 prohibited Federal officers from divulging in a Federal criminal trial interstate telephone communications of defendants, which the officers overheard by means of wiretapping. The present case involves only intrastate messages. The Communications Act shows on its face that it was intended to apply only to interstate and foreign communications, and Section 605 should be construed in the light of this general pur-

pose, despite the absence of an express limitation in the second and fourth clauses of the Section. The legislative history of the Act and of Section 605 in particular shows that Congress did not intend to legislate with respect to intrastate communications. Any other interpretation does violence to the order and logic of the various clauses of the section, and produces inconsistencies and absurdities in the operation of the Section.

Nor can it be assumed that Congress thought it necessary to forbid the divulging of intrastate communications in order to protect the secrecy of interstate and foreign communications, for there is no difficulty in dealing with each type of communication separately. Although it might be said that *interception* of interstate messages could not easily be prohibited without also forbidding interception of intrastate messages passing over the same lines, it is clear both from the language used and the legislative history that Section 605 does not prohibit interception *per se* but only interception *and* divulging.

Petitioners urge that even if Section 605 does not or cannot forbid the interception and divulging of intrastate messages, nevertheless the policy against wire-tapping should be given effect by construing the Section as laying down a rule of evidence. But there is no basis either in the statute or in the *Nardone* decision for such a view. That decision merely gives effect to an express statutory prohibi-

tion against certain disclosures. It is evident from the opinion that this Court regarded the statute as operating on the Federal officers who were testifying, not on the trial court in the admission of evidence.

The *Nardone* decision should be limited to its facts and not extended to intrastate communications. Ninety-eight ~~and one half~~ percent of all telephone communication is intrastate, and serious practical and constitutional difficulties will arise if the *Nardone* decision is extended to this wide new field. The immunity granted by the Act, as construed in that decision, is broader than the constitutional guarantee of the Fourth Amendment, since not even reasonable "searches" are permissible. Also, under the general language of Section 605, a defendant might have such evidence excluded even when obtained by private persons unconnected with the Government (cf. *Burdeau* v. *McDowell*, 256 U. S. 465) or where the evidence was secured by intercepting some other person's messages (cf. *Hale* v. *Henkel*, 201 U. S. 43; *Agnello* v. *United States*, 269 U. S. 20, 35). If constitutional, the Section thus construed would forbid evidence of intercepted *intrastate* communications by *state* officers in *state* prosecutions, although a state constitution or statute may specifically make such evidence admissible. Section 605 should be construed to avoid doubts as to its constitutional validity.

II

Even if Clause 2 of Section 605 were held applicable to intrastate communications, it was not violated in this case, because the clause prohibits divulging only by persons "not authorized by the sender." The witnesses who testified to the telephone messages in the trial court were parties to the conversation. It should be sufficient that one participant in a telephone conversation authorizes divulgence of the message.

III

Interception of telephone communications by Federal law enforcement officers does not violate the Fourth or Fifth Amendments. The *Olmstead* decision (*Olmstead* v. *United States*, 277 U. S. 438), is controlling and should not be overruled. It has been approved by distinguished commentators and is supported by principles and considerations of public policy. To hold wire tapping unconstitutional would probably preclude Congress from effectively legislating on the subject, whereas this Court has several times indicated that the matter is one of legislative policy.

IV

There was no violation of New York state law in the present case, since the right of law enforcement officers to tap wires has been recognized in at least one New York decision. Even if the state law were violated, the evidence in the instant case

was properly admitted under the common law rule that evidence, although procured illegally, is, nevertheless, admissible. This common law principle was reiterated in the *Olmstead* decision, and there has been no change in conditions since that decision which would justify the adoption of a different rule.

V

Since the telephone conversations in question were introduced through the testimony of parties thereto, strictly speaking there exists in the present case no question of "wire-tapping." These witnesses did not tap any wires and did not derive their information from wire-tapping. Use of stenographic transcripts and phonographic recordings obtained by wire-tapping to refresh the recollection of parties to the conversations was not reversible error since a refreshing memorandum need not itself be admissible. Error, if any, in admitting the transcripts and recordings was not prejudicial where such witnesses had previously testified to the messages.

ARGUMENT

I

THE SECOND CLAUSE OF SECTION 605 OF THE COMMUNICATIONS ACT OF 1934 DOES NOT APPLY TO INTRASTATE TELEPHONE COMMUNICATIONS

The primary objection urged by the petitioners in the trial court against the introduction of the

intercepted intrastate telephone communications was that their admission was prohibited by Clause 2 of Section 605 of the Communications Act of 1934. This clause reads as follows:

> no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person.

The fundamental question involved is whether this clause applies to *intrastate* telephone communications.

The Circuit Court of Appeals in the instant case held that the decision of this Court in *Nardone* v. *United States*, 302 U. S. 379, construing this clause, applied only to interstate communications. It further held that not only the context of the Act but Section 605 itself, when examined as a whole, makes it manifest that the second clause of the Section applies only to interstate and foreign communications.

The view that the second clause of Section 605 does not apply to intrastate communications is supported by the decision of the Circuit Court of Appeals for the First Circuit in *Valli* v. *United States*, 94 F. (2d) 687, and by the decision of the District Court for the Eastern District of Missouri in *United States* v. *Bianco* (unreported, decided January 13, 1938; printed in Appendix B, *infra*, p. 70). The contrary view has been expressed by the Circuit Court of Appeals for the Sixth Circuit in a

per curiam opinion upon rehearing in *Diamond* v. *United States* (unreported, decided April 11, 1938),[1] by the Circuit Court of Appeals for the Third Circuit in *Sablowsky* v. *United States*, 101 F. (2d) 183,[2] and by the United States District Court for the District of Columbia in *United States* v. *Plisco*, 22 F. Supp. 242. See also the opinion of the dissenting judge in the *Valli* case, *supra*.

We submit that the Circuit Court of Appeals in the instant case was correct in deciding that the second clause of Section 605 does not apply to intrastate communications.

A. The second clause of Section 605 should be construed in the light of the avowed purpose of the statute to regulate interstate and foreign communication by wire or radio

Petitioners rely upon the facts that the second clause of Section 605 refers to "any communication" and that, while the first and third clauses of the Section contain the words "interstate or foreign communication," these words are omitted from the second and fourth clauses. From this they argue that Congress intended to make the

[1] The court's principal decision (94 F. (2d) 1012) does not discuss the question. The unreported opinion of the court denying the Government's petition for rehearing is quoted at pages 28–30 of the petition for writ of certiorari herein.

[2] See also *United States* v. *Klee*, 101 F. (2d) 191, which was decided by the Circuit Court of Appeals for the Third Circuit on the same day upon the authority of its prior decision in the *Sablowsky* case.

second and fourth clauses applicable not only to interstate and foreign communications but also to intrastate communications.

This contention ignores the avowed purpose of the legislation, as disclosed on the face of the statute. The title of the Act indicates clearly that its purpose is "the regulation of interstate and foreign communication by wire or radio" (48 Stat. 1064). Section 1 of the Act (48 Stat. 1064; U. S. C., Title 47, Sec. 151) provides in part that "For the purpose of regulating interstate and foreign commerce in communication by wire and radio" and "for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication," there is created a commission to be known as the Federal Communications Commission. Section 2 (a) (48 Stat. 1064; U. S. C., Title 47, Sec. 152) provides that "The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio * * *." Section 2 (b) (48 Stat. 1065; U. S. C., Title 47, Sec. 152) provides that "Subject to the provisions of section 301,* nothing in this Act shall be construed

Section 301, so far as pertinent, provides that " * * No persons shall use or operate any apparatus for the transmission of energy or communications or signals by

to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service of any carrier * * *."[10] These provisions, we submit, are not at all ambiguous and clearly show that the purpose of Congress was to regulate only interstate and foreign communication by wire or radio, except where it otherwise expressly indicated.

It may also be pointed out that while Section 3 of the Act (48 Stat. 1065; U. S. C. Title 47, Sec. 153) gives definitions of the terms "wire communication," "radio communication," "interstate communication," and "foreign communication," which are used throughout the Act, there is incorporated therein no definition of the word "communication," although that word is used in Clause

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radio * * * (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; * * * except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act." (48 Stat. 1081 U. S. C., Title 47, Sec. 301).

[10] See also Sections 3 (e) and (f), 4 (k), 201 (a), 203 (a), 221 (b), 301, 313, 406, 503, and 606 (b); 48 Stat. 1065, 1068, 1070-1071, 1080, 1081, 1087, 1095, 1101, 1104; U. S. C., Title 47, Secs. 153 (e) and (f), 154 (k), 201 (a), 203 (a), 221 (b), 301, 313, 406, 503, 606 (b).

2 of Section 605. It would seem to follow that if Congress had intended by the use of the word "communication" in Clause 2 of Section 605 to refer to any communication other than one of the types defined, it would have incorporated in Section 3 a separate definition of the word "communication." Its failure to do so indicates that Congress felt that it had defined every type of communication with which it was concerned. Hence there is no occasion to attribute to the words "any communication," when used in Clause 2 of Section 605, a meaning which would embrace any communication other than an interstate or foreign communication.

If, as we submit, it was the purpose of Congress by the Communications Act to regulate only interstate and foreign communication by wire or radio, the construction which should be given any part of the Act is one which should be founded upon and in harmony with the avowed purpose of the legislation. *Nashville Ry.* v. *Tennessee,* 262 U. S. 318, 323; *Robinson* v. *Balt. & Ohio R. R.,* 222 U. S. 506, 511.

But the petitioners contend, in effect, that the "wire-tapping provisions" of Section 605 are not regulatory provisions because they do not concern the Commission or its jurisdiction or regulatory powers. For this reason, they assert that these provisions of Section 605, not being regulatory in character, cannot properly be limited to interstate and foreign communications, as are the regulatory

provisions. The argument is based upon the erroneous assumption that only those provisions of the Act which the Commission is specifically given jurisdiction to execute and enforce may properly be denominated as regulatory in character. Obviously, Congress can regulate by legislation which operates directly upon the subject matter as well as through an administrative agency. Section 1, *supra,* makes it manifest that the broad intent and purpose of the Communications Act is to regulate interstate and foreign commerce in communication by wire and radio and that the Federal Communications Commission was created merely to aid in effecting that purpose. Therefore, even assuming that the so-called "wire-tapping" provisions of Section 605 are not within the regulatory powers of the Commission, they nevertheless constitute direct regulation by Congress of interstate commerce in communication by wire or radio, since they are positive prohibitions, fortified by penal sanction,[11] designed to prevent abuse of such commerce.

B. Petitioners' interpretation of Section 605 would result in a strained construction of this section and would cause inconsistencies in its application

In urging that the second and fourth clauses of Section 605 relate to intrastate as well as interstate and foreign communications, although the first and

[11] See Section 501 of the Act (48 Stat. 1100 (U. S. C., Title 47, Sec. 501)).

third clauses admittedly are concerned only with interstate and foreign communications, the petitioners have advanced a construction which, we submit, would result in inconsistencies in application between the several clauses of the Section.

The first clause, in substance, prohibits the unauthorized divulgence of any "interstate or foreign communication by wire or radio" by persons permitted to receive or transmit the same.[12] The second clause, the one here in question, provides that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." The third clause states that "no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto". The fourth clause provides that "no person having received such intercepted communication or having become acquainted with the contents * * * thereof, knowing that such information was so obtained, shall divulge * * * or

[12] In the *Nardone* case this Court said (pp. 380–381) that this clause "provides that no person who, as an employe, has to do with the sending or receiving of any interstate communication by wire shall divulge or publish it or its substance to anyone" other than to certain enumerated persons or under certain enumerated circumstances.

use the same * * * for his own benefit or for the benefit of another not entitled thereto".

Petitioners' interpretation is based upon an artificial segregation of the so-called "interception" clauses of Section 605 (Clauses 2 and 4) which, they argue, are not limited to interstate and foreign communications. But any argument based on such a grouping of the clauses fails, since clause 3, which applies to any "person not being entitled thereto [who] shall receive * * * any * * * communication" also clearly includes interceptors and is expressly limited to interstate and foreign communications. If it be recognized, further, that clause 4 relates only to *third persons* receiving information from prohibited sources (else clause 2 would be rendered superfluous), the following results flow from petitioners' interpretation:

> 1. The interceptor of an intrastate communication may not divulge it [clause 2], but he is not forbidden to use the information for his own benefit or for the benefit of other persons [clause 3 being expressly limited to interstate and foreign communications, and clause 4 being limited to third persons].
>
> 2. An employee of a transmitting agency is not forbidden to use or publish intrastate communications [clauses 1 and 3 being expressly limited to interstate and foreign communications; clause 2 to interceptors; and clause 4 to third persons], but a third person "having become acquainted" with the contents of the communication from

such an employee may not use or publish it (Clause 4).

Such astounding results can be avoided by construing all clauses of Section 605 to relate only to interstate and foreign communications. As the Government sees it, the difference between clauses 2 and 3 is not that they apply to mutually exclusive classes of persons (i. e., receivers and interceptors) or to different types of communications (i. e., intrastate or interstate), but that they merely forbid different abuses. In this light the clauses of the section can be read in logical sequence as they are written, to form a simple and consistent scheme. Clause 1 prohibits publication by employees of transmitting agencies. Clause 2 prohibits publication by an interceptor. Clause 3 prohibits employees and interceptors from using wrongfully obtained information. Clause 4 merely extends the prohibitions of the first three clauses to third persons, forbidding them from divulging or using information derived from prohibited sources.

Moreover, it is not logical to assume that Congress, without express declaration, intended within a single short section of the Communications Act to legislate with regard to two distinct subjects, i. e., regulation of interstate and foreign communications and regulation of intrastate communications. That it was dealing with interstate and foreign communications is, of course, apparent from clauses 1 and 3. There is no basis, other

than the absence of the words "interstate and foreign" in clauses 2 and 4, for supposing that Congress, without any indication of such an intention, suddenly decided to legislate with reference to an entirely new field of communication. Had Congress intended so to enlarge the subject matter to be regulated it would have stated its intention in express language.[13] And one would have expected to find all provisions relating to the same subject matter together, whereas petitioners' interpretation forces the clauses of the section into a disjointed erratic progression: Congress limits itself to interstate and foreign commerce in clause 1, expands its interest to include intrastate commerce in clause 2, reverts to the original limitation in clause 3, and in the 4th clause once more deals with the subject matter of the second preceding clause—all without one word to indicate so vacillating a legislative intent.

No valid argument, we submit, can rest upon Congress' failure to repeat the words "interstate and foreign" in clauses 2 and 4, when this limitation had already been clearly stated in clauses 1 and 3. The draftsmen of the Act evidently believed that the limitation to "interstate and foreign" communications stated in clause 1 carried over

[13] In the one isolated instance in the Communications Act in which Congress attempted in any wise to regulate intrastate communications, it did so in express language. See Section 301 of the Communications Act, the pertinent portions of which are copied in footnote 9, *supra*, pp. 17–18.

without the necessity of repetition to clause 2, since the first two clauses both deal with publication. The limitation to "interstate and foreign" communications is restated in clause 3 only because this is the first point at which "use" of information is prohibited.

C. The legislative history of Section 605 shows that it was intended to apply only to interstate and foreign communications

While we submit that analysis of Section 605, together with examination of other provisions of the Communications Act, show that the section applies only to interstate and foreign communications, there is admittedly a divergence of judicial opinion upon the question (*supra*, pp. 15–16), with the result that reference to the legislative history of the section is warranted. See *United States* v. *Katz*, 271 U. S. 354, 357; *Prussian* v. *United States*, 282 U. S. 675, 678. In considering the legislative history of the section this Court may, of course, "refer to the purpose and scope of the Act from which it was derived." *United States* v. *Mason*, 218 U. S. 517, 525; see also *Logan* v. *United States*, 144 U. S. 263, 302; *United States* v. *Le Bris*, 121 U. S. 278; *McDonald* v. *Hovey*, 110 U. S. 619.

The legislative history discloses that the primary intent and purpose of Congress in passing the Communications Act of 1934 was merely to transfer administrative jurisdiction over enforcement of

the then existing regulatory measures with reference to *interstate and foreign communication* by wire or radio. Thus, the President in his message to Congress on February 26, 1934, recommending the passage of the bill which eventually became the Communications Act of 1934 stated:

> I recommend that the Congress create a new agency to be known as the Federal Communications Commission, such agency to be vested with the authority now lying in the Federal Radio Commission and with such authority over communications as now lies with the Interstate Commerce Commission * * *. (S. Doc. 144, 73d Cong., 2d Sess.)[14]

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[14] The above message was apparently based upon the recommendations of an interdepartmental committee appointed by the President in the latter part of 1933 to study the entire communications system in the United States and to recommend necessary legislation. Associated with this committee in an advisory capacity were Senator Dill, Chairman of the Senate Committee on Interstate Commerce, and Representative Rayburn, Chairman of the House Committee on Interstate and Foreign Commerce. In a report filed on January 23, 1934, this Committee found that the "huge volume of intrastate traffic (which) comprises about 98¼ percent of the total telephone traffic * * *)" was subject to the authority of "State and municipal regulatory commissions." It accordingly made no recommendation with respect to legislation affecting intrastate telephone communication. It did find, however, that there was "need of effective governmental regulation of the interstate and foreign aspects of commercial communication", and recommended "the transfer of existing diversified regulation of communications to a new or single regulatory body, to which would be committed any further Federal control of two-way com-

And the Senate Committee on Interstate Commerce in its report submitting the bill to that body said:

> The purpose of this bill is to create a communications commission with regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio. * * * This bill is so written as to enact the powers which the Interstate Commerce Commission and the Radio Commission now exercise over communications, * * *. [S. Rept. No. 781, 73d Cong., 2d Sess., pp. 1, 2].[14]

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munication and broadcasting." (See Senate Committee Report, 73d Cong., 2d Sess., entitled "Study of Communications by an Interdepartmental Committee," U. S. Govt. Printing Office, 1934, pp. 1, 6, 9.)

[14] At the hearings before the Committee on Interstate Commerce of the Senate on S. 2910, 73d Cong., 2d Sess., which was the predecessor of the above bill, held on March 1934, the Chairman of this Committee, Senator Dill, at page 1, said: "This meeting has been called to hold hearings on Senate bill 2910, a bill to provide for the regulation of interstate and foreign communications by wire or radio, and for other purposes. It is a bill that has been prepared to carry out the desires of the President, primarily, in his message to Congress, to combine the regulatory powers now exercised in the Interstate Commerce Commission and Radio Commission over communications."

In explaining to the Senate the effect of the bill which became the Communications Act, Chairman Dill stated:

"The bill * * * simply writes into law the existing provisions relating to the control of the telephone and telegraph business now contained in the Interstate Commerce Act, and the provisions of the radio law * * * now

If, as the foregoing excerpts clearly disclose, the Communications Act of 1934 was not intended to change or enlarge the field in which "existing law" operated, we submit that Section 605 should not be so construed as to include intrastate communications since the "existing law" was clearly confined in its operation to interstate and foreign communications. The Communications Act of 1934 was based upon the Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 379, as amended by the Act of June 18, 1910, c. 309, 36 Stat. 539, and the Radio Act of February 23, 1927, c. 169, 44 Stat. 1162, neither of which dealt with intrastate communications.

That the Interstate Commerce Act did not apply to intrastate communications is apparent from the following language in Section 7 of the Act of June 18, 1910 (36 Stat. 545):

> the provisions of this Act shall not apply * * * to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a

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being enforced by the Federal Radio Commission." (78 Congressional Record, 73d Cong., 2d Sess., p. 4138–4139.)

A similar explanation of the bill was given to the House by Chairman Rayburn:

"* * * the bill as a whole does not change existing law, not only with reference to radio but with reference to telegraph, telephone, and cable, except in the transfer of the jurisdiction and such minor amendments as to make that transfer effective." (Id., p. 10313.)

See also H. Rep. No. 1850, 73d Cong., 2d Sess., p. 3.

> foreign country from or to any State or Territory as aforesaid.

It also seems evident that the Radio Act of 1927 did not extend to intrastate communications. Section 1 of that Act (44 Stat. 1162) states "That this Act is intended to regulate all forms of interstate and foreign radio transmissions and communications * * *." This limitation upon the application of the Act was also expressed by Congressman White, Chairman of the House Merchant Marine and Fisheries Committee, in reporting on the bill:

> At the very outset the bill asserts Federal jurisdiction over all phases of radio communication in so far as such communication constitutes or affects interstate or foreign commerce. This is but declaratory of existing law * * *. (67 Cong. Rec. 5479.)

The "existing law" to which the Chairman referred was the Radio Act of August 13, 1912, c. 287, 37 Stat. 302, in which Section 1 declares, with unmistakable clarity, that (37 Stat. 302):

> nothing in this Act shall be construed to apply to the transmission and exchange of radiograms or signals between points situated in the same State * * *.

Since the Communications Act of 1934 merely transferred to the newly created Federal Communications Commission the powers then residing in the Interstate Commerce Commission and in the

Radio Commission, and since the provisions of the Interstate Commerce Act and the Radio Act of 1927 were intended in no way to affect intrastate communications, we submit that Congress in enacting the Communications Act of 1934 similarly did not intend in any way to embody therein any provisions affecting intrastate communications.

With specific reference to Section 605, the Committee reports show that this section merely carried over the provisions of Section 27 of the Radio Act of 1927 into the Communications Act of 1934, and there applied those provisions to wire communications as well as radio. That such was the only purpose of Congress in enacting Section 605 is apparent from the following Committee statements:

> Section 605 * * * is based upon section 27 of the Radio Act and extends it to wire communications. (S. Rept. 781, 73d Cong., 2d Sess., p. 11).
>
> Section 605 * * * is based upon section 27 of the Radio Act, but is also made to apply to wire communications. (H. Rept. 1850, 73d Cong., 2d Sess., p. 9.)

This, we submit, completely refutes any contention that it was the intention of Congress to extend Section 605 to intrastate communications.

Moreover, it should be particularly noted that the language of clause 2 of Section 605, which is the only clause involved in the instant case, is substantially identical, except for one word, with the

language of clause 2 of Section 27 of the Radio Act of 1927.[15] The only change made when Congress reenacted this clause in the Communications Act was the substitution of the word "communication" for the word "message." It is apparent from the legislative history, heretofore recited, that Section 27 of the Radio Act referred only to interstate and foreign communications. It follows that, unless from the substitution of the word "communication" for the word "message" an intent on the part of Congress to extend the scope of the clause to include intrastate communications can be shown, it must continue to embrace only interstate and foreign communications. However, the legislative history of the Communications Act shows that this change was made in response to a suggestion by the Interstate Commerce Commission, which sought the change solely because the word "message," as distinguished from the word "communication," was not defined in the bill.[16] It is therefore appar-

[15] The second clause of Section 27 of the Radio Act of 1927 (Appendix A, *infra*, p. 66) reads: "no person not being authorized by the sender shall intercept any *message* and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted *message* to any person * * *." [Italics ours.]

[16] In its letter dated March 16, 1934, to Senator Dill, Chairman of the Senate Interstate Commerce Committee, the Interstate Commerce Commission said:

"The word 'messages' is used in several places in the bill * * *. Either the word 'messages' wherever used should be changed to 'communication,' or 'messages' should be defined in this section" [Section 3]. (Hearings on S. 2910,

ent that the substitution of the word "communication" for the word "message" was a mere formal act, and does not justify any conclusion or inference that Congress by such substitution intended to extend the scope of the clause to embrace intrastate communications. In the absence of such an intent, we submit that the language of clause 2 has not assumed a different meaning from that which it originally had, but continues to embrace only interstate and foreign communications. Consequently there is no merit in the petitioners' contention that the words "any communication" include intrastate communications.

D. It is not necessary that the second clause of Section 605 be applied to intrastate communications in order to render effective the statutory prohibition against the disclosure of interstate communications

Petitioners contend that it is necessary to prohibit both the interception and divulgence of all communications in order to assure the privacy of interstate communications. They point out that if interception of intrastate messages were permitted, there could be no way of preventing interception of interstate messages. The petitioners' contention is based upon the false premise that clause 2 of Section 605 prohibits not only divulgence but also interception as such. However, as

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73d Cong., before Senate Committee on Interstate Commerce, p. 201; hearings on H. R. 8301, 73d Cong., before Committee on Interstate and Foreign Commerce of House of Representatives, p. 89.)

held by the Circuit Court of Appeals (R. 118), there is no prohibition of interception without more. Obviously, if this be true, the second clause was really directed at unauthorized divulging and does not attempt to assure secrecy insofar as it may be invaded by mere interception. Of course, it was not necessary for Congress to prohibit the disclosure of both intrastate and interstate messages in order to prevent the disclosure of interstate messages alone. It cannot be said, therefore, that prevention of disclosure of intrastate communications is necessary to render effective the prohibition against the disclosure of interstate communications.

That the second clause of Section 605 is aimed at unauthorized divulging rather than interception as such appears from the language of the clause itself. It should be noted that the clause employs the conjunctive and not the disjunctive. It reads: "No person * * * shall intercept *and* divulge * * *." Interception is therefore coupled with publication and it is the combination of both which is prohibited. There can, therefore, be no violation of the clause without publication.

That the purpose of the language quoted was to prohibit unauthorized publication rather than interception *per se* also appears from the title of Section 605, from other clauses of the Section and from the Committee Reports. Section 605 is entitled "Unauthorized Publication of Communications" (48 Stat. 1103), and it is manifest that the other clauses of the Section are specifically directed

only at unauthorized publication or use. Indeed, the Committee Report refers to the forbidden act, in explaining the purpose of Section 605, by the single word "publication":

> Section 605, prohibiting unauthorized publication of communications, is based upon section 27 of the Radio Act * * * (S. Rept. No. 781, 73d Cong., 2d Sess., p. 11; H. Rept. No. 1850, 73d Cong., 2d Sess., p. 9).

Further light is shed upon the intent of Congress to limit the scope of Section 605 to unauthorized publication by reference to the background of the Radio Act of 1912 and to the language of Regulation Nineteenth of Section 4 thereof.[18] The Radio Act of 1912 was adopted to implement a treaty, signed at Berlin in 1906 and ratified by the Senate of the United States in 1912 (37 Stat., pt. 2, p. 1565), obligating the United States to assure the secrecy of certain wireless communications.[19] (H. Rept.

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[18] Section 27 of the Radio Act of 1927 (from which Section 605 is drawn) was based on Regulation Nineteenth of Section 4 of the Radio Act of 1912 (copied in Appendix A, *infra*, pp. 66–67). H. Rept. 404, 69th Cong., 1st Sess., pp. 1, 4, accompanying H. R. 9108, 69th Cong., 1st Sess. Section 15 of H. R. 9108 is identical with Section 27 of the Radio Act of 1927.

[19] The Chairman of the House Committee on Merchant Marine and Fisheries, who was in charge of the bill which became the Radio Act of 1912, in the course of debate on Regulation Nineteenth of Section 4 thereof, said: "I will call the gentlemen's attention to the fact that this relates to secrecy of messages and is required by the Berlin convention, and we are simply carrying out the provisions of that convention to which we became a party by the action of the Senate" (48 Cong. Rec. 10593).

582, 62d Cong., 2d Sess., p. 16.) Nevertheless, the Senate Committee Report, with respect to the Bill which became the Radio Act of 1912 stated: "The bill does not interfere in any way with the *hearing* of messages by amateurs at all times and all places as they may elect." (Italics ours.) (S. Rept. 698, 62 Cong., 2d Sess., p. 14.) Moreover, the Nineteenth Regulation of Section 4 of the Act itself discloses on its face that it is concerned only with unauthorized "divulging or publishing" of wireless messages (Appendix A, *infra*, pp. 66–67).

E. Section 605 is not a "rule of evidence" statute nor was it construed as such in the Nardone decision

Petitioners contend that the second clause of Section 605 embodies a rule of evidence applicable as well to intrastate as to interstate and foreign communications. Apparently in support of this contention they cite the *Nardone* decision.

While the effect of the decision of this Court in the *Nardone* case was to render inadmissible in a Federal criminal prosecution interstate telephone communications intercepted by Federal officers, it must be pointed out that neither the statute nor the *Nardone* decision lays down a rule of evidence *per se*. It is apparent that, so far as the statute is concerned, there is no language which states that intercepted communications may not be received in evidence. The statute is not directed to the judicial processes but instead declares that such communi-

cations shall not be divulged to "any person." In addition, there is not a word in the *Nardone* opinion to support the view that the second clause of Section 605 establishes a rule of evidence, nor is there the slightest indication in the Court's opinion that it was exercising a power, recognized in *Funk* v. *United States,* 290 U. S. 371, to declare, independently of the statute, a common law rule of evidence which will exclude intercepted communications. It is evident from the opinion that the Court's problem was solely one of statutory construction, i. e., whether the language of the second clause was broad enough to include a divulgence by Federal officers in a Federal court of intercepted interstate telephone communications. There is no basis whatever in the opinion for believing that the Court was of the view that intercepted *intrastate* communications should be barred upon any theory as to a rule of evidence without regard to whether the second clause of Section 605 extends to intrastate communication.

But conceding *arguendo* that a rule of evidence as such is embodied in the second clause of Section 605 as construed by this Court in the *Nardone* case, we nevertheless submit that the application of such a rule must be confined to interstate and foreign communications. As we have previously demonstrated, the language of the Act and the legislative history show that the second clause of Section 605 was not intended to embrace intrastate communications, and there is no justification for giving it

a different interpretation, even if the clause be regarded as creating a rule of evidence.

F. The Nardone decision should be limited to its facts and not extended to intrastate communications

The only communications involved in the *Nardone* case were interstate.[20] As this Court has fre-

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[20] This Court, in reciting the facts involved in the *Nardone* case, stated in its opinion (p. 380):

"Over the petitioners' objection and exception federal agents testified to the substance of petitioners' interstate communications overheard by the witnesses who had intercepted the messages by tapping telephone wires. * * *"

The Circuit Court of Appeals for the Second Circuit, the court whose decision was reviewed in the *Nardone* case, said in its opinion in that case (90 F. (2d) 630, 632):

"We take it for granted that this [Section 605] refers only to interstate and foreign messages. * * *"

And in its opinion in the present case, that court said with reference to its decision in the *Nardone* case (R. 117):

"There [in the *Nardone* case], both interstate and intrastate telephone messages were intercepted through wire tapping and used as proof in a criminal trial. We held that under Section 605 of the Federal Communications Commission Act (U. S. C., Title 47, Chapter 5, § 605) interstate communications were not inadmissible and assumed that the act did not cover the intrastate messages. The Supreme Court reversed our decision on the ground that the use of interstate messages as evidence was essentially forbidden by the clause of § 605, supra, which provides that: 'no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person.'

"In reaching the above conclusion it cannot be supposed that the Supreme Court was intending to deal with anything but the admissibility of interstate communications,

quently pointed out, "What was said in the opinion must be limited, under well-known rules, to the facts and issues involved in the particular record under investigation." *Ger. Alliance Ins. Co.* v. *Home Water Co.*, 226 U. S. 220, 234; see also *Wisconsin* v. *Lane*, 245 U. S. 427, 435; *Coleman* v. *Miller*, No. 7, October Term, 1938, decided June 5, 1938.

In the present case petitioners ask the Court to extend to intrastate communications the rule which the *Nardone* case laid down for interstate communications. Since 98¼ percent of all telephone communication is intrastate [21] a proposal to extend the *Nardone* decision to so vast a field justifies the Government in pointing out the serious implications of such an extension. In the *Nardone* opinion the Court indicated that it was not concerned with Congressional intent as revealed by legislative history since the language of the statute was plain. Nevertheless, since the legislative history clearly shows that the language employed by Congress was inadvertently [22] broader than the

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for they were the only messages, the reception of which we had treated as open to doubt."

[21] See Study of Communications by an Interdepartmental Committee, p. 9, 73d Cong., 2d Sess., U. S. Govt. Printing Office, 1934.

[22] It should be noted that when Congress, subsequent to the *Nardone* decision, turned its attention to the subject of wire tapping by Federal officers, vigorous debate ensued (83 Cong. Rec. 9462, 9635), in marked contrast to the com-

legislative intent, this Court may well hesitate to extend the doctrine to new situations, plainly beyond the intended scope of the statute and not expressly covered in the opinion. Particularly should this be the case where strong policy considerations oppose such an extension.

One unfortunate effect of clause 2 of Section 605 as interpreted in the *Nardone* decision is that it precludes any procedure analogous to the issuance of a warrant to authorize a Government investigator to make this type of search. One's person, house, papers, and effects may be subject to reasonable search under a warrant issued "upon probable cause" (U. S. C., Title 18, Sec. 613), although these are within the explicit protection of the Fourth Amendment. Yet, as an incidental effect of the Federal Communications Act, telephone communications, although not within the protection of the

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plete silence on this subject at the time of passage of the Federal Communications Act. A bill, S. 3756, 75th Cong., 3d Sess., was introduced to amend Section 605 of the Federal Communications Act to permit interception of telephone communications by Government investigators upon authorization by the head of the investigating agency. This bill passed the Senate and was approved by the House with an amendment imposing special penalties on an investigator who intercepted telephone communications without his superior's authority. Although both houses thus expressed themselves in favor of taking Federal investigations out of the operation of Section 605, the bill died when the Senate failed in the closing hours of the session to take up the House amendment for consideration.

Fourth Amendment, are given an absolute immunity from reasonable search and seizure. This immunity would extend not only to the overhearing of self-incriminating statements relating to crimes previously committed, but even to situations where the very use of the telephone is part of a criminal act. Such is the case where telephone communications constitute overt acts in carrying out a criminal conspiracy. The Court would be faced with an even more striking illustration if a defendant, charged with "unlawfully disclosing information affecting national defense" (U. S. C., Title 50, Sec. 32) via the telephone or radio, were to use the Federal Communications Act to shut out the evidence of law officers who apprehended him *flagrante delicto*. It is unnecessary to expand upon the practical difficulties in law enforcement which would arise under such a construction.

Moreover, if Section 605 is a rule of evidence in the Federal courts, it would seem to exclude testimony from intercepted telephone communications although they had been procured by private persons unconnected with the Government and although they might be communications of a person other than the defendant. Yet in *Burdeau* v. *McDowell*, 256 U. S. 465, this Court held that the Government might avail itself of evidence unlawfully seized by private persons, and in many cases it has been held that a defendant cannot complain of a violation of the constitutional rights of third persons. See, for example, *Hale* v. *Henkel*, 201 U. S. 43, 70;

Agnello v. *United States*, 269 U. S. 20, 35.[23] Congress, of course, was not bound by policy considerations in these decisions, but it is difficult to believe that Congress intended to undo the effects of the *Burdeau* and *Hale* cases, as well as the *Olmstead* case (*Olmstead* v. *United States*, 277 U. S. 438), by Section 605 of the Federal Communications Act.

The extension of the doctrine of the *Nardone* case to intrastate communications involves further difficulties in addition to those already pointed out. If the Federal Communications Act were so construed, its provisions would seem to override provisions like Article 1, Section 12, of the New York State Constitution, which became effective January 1, 1939, permitting interception under search warrant,[24] or the section of the Louisiana wire-tapping statute specifically exempting law enforcement offi-

[23] In this connection it should be observed that no intercepted telephone call to which petitioner Goldstein was a party was introduced (see p. 9, *supra*).

[24] "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof." Constitution of 1938, Article I, Sec. 12. Ap-

cers from the general prohibition. Louisiana Code of Criminal Procedure, Art. 1183. For, since there is no word of limitation to federal proceedings, it would forbid the divulging of intercepted *intrastate* communications by *state* officers in *state* prosecutions regardless of local interpretations of constitutions and statutes. Cf. *Rowan* v. *State*, 175 Md. 547.

There would be a substantial question as to the constitutionality of Section 605 under the construction proposed by petitioners. Indeed, the language of the Section, if not confined to interstate and foreign communications, is general enough to apply to a purely intrastate telephone system having no connection with any interstate system. One court has already refused to adopt the construction urged by petitioners in part because of its doubts as to constitutionality. *United States* v. *Bianco*, Appendix B, *infra*, p. 71. And this Court has many times stated that legislation should be so interpreted as to avoid doubt as to its constitutional validity. *United States* v. *La Franca*, 282 U. S. 568, 574; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 379.

It is submitted that the doctrine of the *Nardone* decision should not be extended to intrastate communications in view of the grave new difficulties, constitutional and practical, which would be involved in applying the rule to a vast new field.

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proved Nov. 8, 1938. For the debates on this amendment see Revised Record of the Constitutional Convention of the State of New York, April 5 to August 26, 1938.

II

SINCE ONE OR BOTH PARTIES TO EACH COMMUNICATION TESTIFIED AS TO THE CONTENTS, SUBSTANCE, OR PURPORT THEREOF, DISCLOSURE OF THE INTERCEPTED TELEPHONE COMMUNICATIONS WAS "AUTHORIZED BY THE SENDER" WITHIN THE MEANING OF THE SECOND CLAUSE OF SECTION 605

The record discloses that 38 of the intercepted communications were put in evidence upon the testimony of both parties to the telephone conversations. Thirty-seven of the communications were put in evidence upon the testimony of one of the parties. In other words, 75 of the 76 intercepted messages to the admission of which defendants objected were admitted only after they had been identified by at least one of the parties. The parties identifying the communications were four of the defendants, who testified for the Government (R. 129).

Clause 2 of Section 605 does not forbid the authorized publication of intercepted communications. It provides that "no person not being authorized by the sender" shall intercept any communication and divulge or publish, the existence, contents, etc., of such intercepted communication to any person. As we have heretofore pointed out (*supra*, pp. 32–35), this clause is not directed against interception as such but is aimed at the unauthorized divulging of intercepted communica-

tions. That the second clause permits the divulging of intercepted communications if the "sender" has authorized such divulging is apparent. It would seem immaterial whether there was prior authorization for the interception or whether the interception was ratified by the authorization to divulge.

Obviously the word "sender" was not an apt word to use in connection with telephone communications. It applies rather to telegraphic and other like communications. The Communications Act, however, applies not only to one-way communications but also to two-way communications, such as telephone conversations, in which two parties are essential. Both logically and practically, the word "sender" as applied to telephone conversations would seem to be without meaning unless it applies to either party to such a communication. Thus, aside from any question of interception or any question of privilege, if two parties converse by telephone, there cannot be any doubt that either party may divulge or testify as to the complete conversation without the consent or authorization of the other. The rights of either party to divulge or testify should be no different simply because a third party has intercepted the message. Under any other construction, to give an example, an accused who was a party to an intercepted telephone conversation and whose life might depend upon the admission of such conversation in corrob-

oration of his own testimony would be deprived of the benefit of the corroborative evidence if the other party to the conversation either refused to authorize the divulging of the conversation or for some reason could not be located. We do not believe that such a result could have been intended by Congress.

It would, therefore, seem that the word "sender" as used in the second clause of Section 605 should be so construed as to permit the divulging of the telephone conversation in court where either party thereto has sanctioned such divulging. If this be so, the divulging in court of 75 of the 76[21] communications (R. 129) was "authorized by the sender" within the meaning of the clause.

Petitioners argue at length that there was a vio-

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[21] If the Government's interpretation be accepted, the only communication the divulging of which may not accurately be said to have been "authorized" by the sender is Government's Exhibit 307 (R. below 3102–3103). This communication was between the petitioners Gross and Weiss. It was identified by the defendant Spitz, who, while in Weiss' office, overheard his end of the conversation and testified to what he heard (R. below 1333–1335). Subsequently the exhibit was admitted during the cross-examination of the petitioner Gross over his objection (R. below 2113–2114). While this communication related to fees to be charged by Weiss and indicated that Gross was a "runner" for Weiss, we submit that this single communication cannot be said to have been prejudicial to either Weiss or Gross, since it is apparent from the opinion below that there was ample evidence, other than this communication, to establish the conspiracy and scheme charged and to connect both petitioners therewith (R. 124, 125).

lation of the second clause of Section 605 by the interception and divulging of the communications prior to their admission in evidence. We are, of course, here concerned only with the question whether their divulging in court was authorized. They also assert that the defendants who testified for the Government were induced by hopes and expectations of leniency, if not by promises thereof, to give their authorization. There is clearly nothing in the record which indicates that their authorization was induced by promises of leniency (R. below 112, 596, 1127, 1408, 2577). And even if it be assumed that their authorization was induced by hopes and expectations of leniency, it is obvious that their authorization must still be deemed to be voluntary.

III

THE HOLDING IN THE OLMSTEAD CASE THAT EVIDENCE OBTAINED BY INTERCEPTING TELEPHONE COMMUNICATIONS IS NOT RENDERED INADMISSIBLE BY THE FOURTH AND FIFTH AMENDMENTS SHOULD NOT BE OVERRULED

The facts of the present case are not distinguishable from those in the *Olmstead* case which settled the constitutional issues nearly twelve years ago. In the present case, as in the *Olmstead* case, "There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses

or offices of the defendants."[25] Petitioners, therefore, ask the Court to reconsider and overrule its decision in the *Olmstead* case. They do not attempt to reargue the constitutional issues so carefully considered in that case, but rely solely upon the reasoning set forth in the dissenting opinions. The Government too accepts the view that little can be added to the thorough discussion in the *Olmstead* opinions. However, a few observations with respect to the decision may be helpful.

In the first place, although the Court in the *Olmstead* case was divided five to four on affirming the judgment below, it actually stood five to three on the question whether telephone communications

[25] 277 U. S. at p. 464. In the *Olmstead* case, the manner in which the telephone wires were tapped is described as follows (p. 456–457):

"Small wires were inserted along the ordinary telephone wires from the residences of four of the petitioners and those leading from the chief office. The insertions were made without trespass upon any property of the defendants. They were made in the basement of a large office building. The taps from house lines were made in the streets near the houses."

In the instant case the evidence likewise shows that the taps were made without any trespass upon any of the property of the petitioners (R. 64–65, 74–75, 88–89), nor do they contend that there was any invasion of their houses or offices in making such taps.

Neither in the *Olmstead* case nor in the present case did the Federal officers hold warrants authorizing the interception of communications. As is indicated later in this brief (*infra*, pp. 52–53), there is considerable doubt whether a warrant meeting the requirements of the Fourth Amendment could be issued.

were protected by the Fourth Amendment. Mr. Justice Holmes, while stating that "Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them", nevertheless, was "not prepared to say that the penumbra of the Fourth and Fifth Amendments" precluded the admission into evidence of intercepted telephone messages (p. 469). Moreover, with full recognition of the cardinal importance of its premises as to the necessity of personal liberty, the Government must challenge the principle enunciated in Mr. Justice Brandeis' dissent to the effect that the Fourth and Fifth Amendments confer an unrestricted "right to be let alone" (p. 478). Obviously in a community of one hundred and thirty million people the individual cannot isolate himself from a minimum of social supervision and impingement upon his privacy, and the decisions of this Court have frequently recognized limits upon the right to be let alone when balanced against the public interest in effective enforcement of the laws.

In *Hester* v. *United States*, 265 U. S. 57, this Court, in an opinion by Mr. Justice Holmes, sustained the right of Federal enforcement officials without search warrant to commit trespass upon a man's land in order to observe his activities, when there was reasonable ground to believe that the man was violating the law. In *Carroll* v. *United States*, 267 U. S. 132, this Court held that the Fourth

Amendment did not forbid prohibition agents from stopping a private passenger auto proceeding along a public highway, in order to search for and seize liquor concealed in the upholstering, although the agents acted without warrant but upon reasonable belief that the auto was being used for bootlegging. Mr. Justice Brandeis himself saw no reason to dissent from this Court's decision in *Agnello* v. *United States*, 269 U. S. 20, although the arrests in this case were made without warrant after the Government's agents, by looking through the windows into the house of one of the defendants, saw the defendants selling cocaine. Nor did the Court regard the use of a search light to find out what was going on on a small boat at sea as a search within the meaning of the Fourth Amendment. *United States* v. *Lee*, 274 U. S. 559. Yet the use of the telephone pick-up is only an aid to hearing as the search light is an aid to seeing. Both invade privacy equally, except so far as those whose conduct is observed are aware of the surveillance. This, however, cannot lead to a different result, for the element of secret observation was present as fully in the *Agnello* case as in the *Olmstead* case.

To Mr. Justice Brandeis' fear of the effects of scientific progress in crime detection upon privacy (p. 474) we can reply only that when men learn to see through walls and to read thoughts, these faculties will be employed by criminals against society and society should be able to protect itself by the

same weapons. Liberty of the individual lies not so much in a man's right not to have his words and thoughts known in a court of law but in a firm protection of freedom of speech and of thought. Possible abuse of powers conferred upon law officers is an argument for punishing abuse, not for eliminating a useful power.[37]

With reference to the other arguments contained in the opinions of Mr. Justice Brandeis and Mr. Justice Butler, we believe that they were sufficiently met in the opinion of the Chief Justice.

We submit, therefore, that the *Olmstead* case was rightly decided. This Court cited it as authority only two years ago. *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, 145. The *Nardone* decision itself embodies a reaffirmation of the holding in the *Olmstead* case, since the Court rested its decision squarely on Section 605 of the Communications Act, and recognized a distinction between practices forbidden by Section 605 and those forbidden by the Amendments by saying (p. 383):

> The same considerations may well have moved the Congress to adopt § 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution.

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[37] Compare Mr. Justice Holmes' treatment of the "abuse argument" as applied to the question of state taxation of Federal instrumentalities: "The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 223.

Finally, it is worth noting that the decision of the majority in the *Olmstead* case has received the considered approval of outstanding commentators on constitutional law.[*]

We strongly urge that this Court should not now enlarge the scope of the Fourth and Fifth Amendments to include a prohibition against the admission of evidence obtained by intercepting telephone communications. Heretofore this Court has clearly recognized that the interception of communications and the admission of evidence obtained thereby, present subjects to be dealt with by Congress in accord with its legislative policy. In *Olmstead* v. *United States, supra* (at pp. 465–466) this Court said:

> Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evi-

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[*] Corwin, The Supreme Court's Construction of the Self-incrimination Clause, in Selected Essays on Constitutional Law, Vol. 2, at p. 1414 (reprinted from 29 Mich. L. Rev., pp. 1, 191); Willis on Constitutional Law (1936), p. 539; Wigmore, 23 Ill. L. Rev. (1928), p. 377 (reprinted in Wigmore on Evidence (2nd ed.), 1934 Supp., § 2184b, p. 948. For other comments approving the *Olmstead* decision, see 27 Mich. L. Rev. 78 (1928); 13 Minn. L. Rev. 58 (1928); and 38 Yale L. Jour. 77 (1928). The Yale Note concludes: "The suggestion of the minority that 'dirty business' of this type should be severely punished will readily be agreed to. But the history of the federal rule indicates that practical convenience and logical consistency will be better served if relevant evidence is held admissible and the offenders who obtained it are dealt with in less devious ways."

dence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment.

In *Nardone* v. *United States, supra,* at p. 383, this Court again declared that the question was one of policy for Congress.

A holding by this Court that the obtaining of evidence by the interception of telephone communications violates the Fourth and Fifth Amendments would not only overrule its well considered opinion in the *Olmstead* case but would probably result in forever precluding Congress from legislating upon the subject. For it is evident, as Chief Justice Taft pointed out in the *Olmstead* case [p. 464], that the searches and seizures dealt with in the Fourth Amendment are searches and seizures of material things; and the safeguards there thrown about the use of warrants are appropriate only to such searches and seizures: the warrant must particularly describe "the place to be searched, and the persons or things to be seized." This view is borne out by the Espionage Act of June 15, 1917, c. 30, Title XI, 40 Stat. 228 (U. S. C., Title 18, §§ 611–633) which is the general statute governing Federal search warrant procedure. The relevant provisions of this Act evidently represent a Congressional interpretation of the scope of the Fourth Amendment. Accordingly, it is significant that the issuance of the warrant is authorized only for property stolen or embezzled, property "used as the means of committing a felony", and property

or papers held for the purpose of aiding a foreign government (U. S. C., Title 18, § 612).[29] Congress was here but following the precept of this Court, which has many times pointed out that the Fourth Amendment forbids a search, with or without warrant, purely for *evidence,* as distinguished from a search for contraband, instruments of committing crimes, articles subject to forfeit for nonpayment of duty or other things in which the Government can assert some proprietary interest. *Boyd* v. *United States,* 116 U. S. 616, 623–624, 630–633; *Gouled* v. *United States,* 255 U. S. 298, 308–312; *United States* v. *Lefkowitz,* 285 U. S. 452, 467. If, then, a warrant must particularly describe the thing to be seized, and if even a warrant issued on probable cause cannot constitutionally authorize a search for evidence as such, it would seem impossible for Congress to adopt any procedure, however safeguarded, which would permit wire tapping. It is not necessary to remind this Court that we live in a time of international crisis and that situations may well arise where Congress will be faced with the necessity of authorizing the use of wire tapping for purposes so basic as to aid in the preservation of our national security by counter-espionage measures.

"It must be remembered," said Mr. Justice Holmes in *Missouri, Kansas & Texas Ry. Co.* v. *May,* 194 U. S. 267, 270, "that legislatures are ulti-

[29] See also provisions of the Espionage Act for inventory of property seized, return of property unlawfully seized, etc.

mate guardians of the liberties and welfare of the people in quite as great a degree as the courts." And in discussing the restrictions upon the Constitutional spending power in *United States* v. *Butler*, 297 U. S. 1, 87, Mr. Justice Stone added, "Another is the conscience and patriotism of Congress and the Executive." The use of wire tapping, we insist as well as concede, contains the possibility of grave abuse. A government bent on oppression would find it a convenient instrument to add to its arsenal of weapons for accomplishing that oppression. But, by the same token, each of the powers of government may be perverted from its purpose and directed to oppression. An enlightened people, acting through a responsible legislature and executive, is the ultimate safeguard of liberty.

The Constitution, it is true, has forbidden a number of governmental actions which by their nature and history had been shown to contain a risk of oppression greater than that which was warranted by their utility in law enforcement. The interception of telephone messages cannot be included among these. Criminal organization grows in complexity as does the economic society generally. We cannot believe that the Constitution is intended to remove beyond official access an instrument so universally useful in the commission of crime as the telephone. The legislature and the executive, and, should they fail, the courts, can guard against oppression if ever the use of wire tapping should be

pressed beyond the legitimate bounds of society's defense against organized crime. We think this defense should not be sacrificed to speculative fears of future abuse, any more than should the other powers of government, and that the *Olmstead* case should not be overruled.

IV

THE INTERCEPTED TELEPHONE COMMUNICATIONS WERE ADMISSIBLE EVEN IF OBTAINED IN VIOLATION OF STATE STATUTE

Petitioners assert that wire tapping by Federal officers is made a crime by New York statute (Consol. Laws N. Y. Chap. 40, § 1423, Par. 6, Appendix A, *infra;* pp. 68–69), and that therefore evidence obtained by such wire tapping should be held inadmissible in a Federal court. They ask that the well-settled common-law rule applied by this Court in the *Olmstead* case, i. e., "that the admissibility of evidence is not affected by the illegality of the means by which it was obtained" (p. 467), be changed so as to bar evidence alleged to have been obtained as the fruits of crime.[20]

It is not true, as petitioners state (Br. 36–37), that the majority of the Court in the *Olmstead* case construed the state statute there involved (Wash-

[20] Petitioners contend for no modification of the common-law rule so as to exclude evidence alleged to have been obtained by unethical methods, and admit that "nice ethical conduct" in the acquisition of evidence is doubtless too high a standard (Br. 37).

ington)[31] to apply to wire-tapping by Federal officers. On the contrary it declined to decide whether the Washington statute applied to Federal officers, saying (p. 469):

> Whether the State of Washington may prosecute and punish federal officers violating this law * * * is not before us.

Likewise, there is no basis for the petitioners' assertion that the equally general provisions of the New York statute make it an offense for Federal officers to tap wires in the detention of crime. They cite no state decision which supports this assertion. In fact, such state authority as exists would seem to recognize the right of law enforcement officers to tap wires for the purpose of apprehending criminals (*People* v. *Hebberd*, 96 Misc. 617, 620–621, Sup. Ct. N. Y.), or to compel the disclosure by employees of telephone companies of the contents of communications utilized in the perpetration of crime. Consol. Laws of N. Y., Chap. 40, § 552, Appendix A, *infra*, pp. 67–68.

In any event, the application of the New York wire-tapping statute to Federal officers would be doubtful,[32] and this Court should not attempt to

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[31] That statute, adopted in 1909, provides:

"Every person * * * who shall intercept, read, or in any manner interrupt or delay the sending of a message over any telegraph or telephone line * * * shall be guilty of a misdemeanor." (Remington Compiled Statutes, 1922, § 2656).

[32] See *Tennessee* v. *Davis*, 100 U. S. 257; *In re Loney*, 134 U. S. 372; *In re Neagle*, 135 U. S. 1; *Boske* v. *Comingore*, 177 U. S. 459.

construe the statute, unless such construction is essential to its decision. *Rowley* v. *Chicago & Northwestern Ry.*, 293 U. S. 102, 104–105; *Porter* v. *Investors Syndicate*, 287 U. S. 346, 347; see also *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

We submit that in the instant case it is not essential to determine whether the New York statute applies to Federal officers since even if it be assumed *arguendo* that it does, this fact does not render inadmissible the evidence in controversy."[11] It is, of course, the accepted common law rule, reasserted by this Court in the *Olmstead* case, that the admissibility of evidence is not affected by the illegality of the means by which it was obtained. That in Federal courts this rule applies to evidence obtained by violation of statute is clear from the following statement in the *Olmstead* decision (p. 468):

> * * * the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it.

In seeking to have this Court create an exception to the accepted rule which would render inadmissable evidence obtained by Federal officers in violation of state statutes, petitioners rely primarily upon the view expressed by the dissenting justices

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[11] It should be noted that the New York statute cited by petitioners does not declare that evidence obtained by wire tapping is inadmissible in a state court. Cf. *People* v. *McDonald*, 177 App. Div. 806, 809–810 (N. Y.); *Matter of Davis*, 252 App. Div. 591, 598 (N. Y.).

in the *Olmstead* case. While this Court has recognized that it has the power in the absence of congressional legislation to formulate and declare modern rules of evidence for the Federal courts in the light of altered conditions, particularly where the common law rule has become outmoded or has outlived the reason for its adoption (*Funk* v. *United States*, 290 U. S. 383–384), the petitioners in the instant case have made no showing that the common law rule which they seek to have modified is out of harmony with the current trend of criminal jurisprudence. Indeed, our examination discloses that this rule of the common law is still in force in England, in Canada, and in this country, except that in the Federal courts and in some of the state courts evidence is excluded when obtained in violation of constitutional provisions.[24] No legislation or decision has been found outlawing evidence obtained merely in violation of a statute as

[24] *Olmstead* v. *United States*, *supra* (p. 467); *People* v. *Defore*, 242 N. Y. 13, 21; Wigmore on Evidence (2d ed.), Vol. IV, Sec. 2183; Jones, Commentaries on Evidence (2d ed.), Vol. V, Sec. 2075, Note 6; Underhill's Criminal Evidence (4th ed.), Sec. 796–798; Use of Evidence Obtained by Illegal Search and Seizure, Vol. 8, Am. Bar Ass'n J., p. 479, Aug. 1922, collecting the English and Canadian, and Federal and state cases. It is significant that nowhere in any of the dissenting opinions is there any indication that the modern trend of legislation and judicial decision is contrary to the common law doctrine. Indeed, the burden of the dissenting opinions considering the question is in effect that there should never have been any such rule, at least so far as law enforcement officers are concerned.

contrasted with the violation of a constitutional provision. Nor have petitioners shown any fundamental alteration of conditions with respect to telephonic communications since the decision in the *Olmstead* case which would justify the adoption of the exception which they advocate. In 1927, immediately prior to the *Olmstead* decision, there were in this country 155 telephones per thousand population, while in 1937 (the last date for which figures are available) there were 150 per thousand. Also, in 1927 there were 246 telephone calls per capita, while in 1937 there were 255 per capita.[35] It is evident, therefore, that there has not been that fundamental change of conditions which would warrant any modification of the common law rule applied in the *Olmstead* case.

V

THE CHALLENGED TESTIMONY WAS ADMISSIBLE EVEN IF THE FEDERAL COMMUNICATIONS ACT OR THE FOURTH AND FIFTH AMENDMENTS BE CONSTRUED TO BAR INTRODUCTION INTO EVIDENCE OF INTERCEPTED INTRASTATE TELEPHONE COMMUNICATIONS

Although for the sake of convenience we have heretofore referred to the evidence in controversy as "intercepted telephone communications," a significant distinction between the present case and the "wire tapping" cases previously decided by this Court lies in the fact that the witnesses who testified

[35] Census of Electrical Industries, 1937, Telephones and Telegraphs, U. S. Dept. of Commerce (U. S. Government Printing Office, 1939), pp. 12, 13.

to the telephone communications at the trial were parties to the conversations." These witnesses "intercepted" no telephone calls. They invaded no one's constitutional rights. Each disclosed only what he said and what he heard in a perfectly lawful manner.

It will be protested against this suggestion (1) that the Government used transcripts and phonographic recordings of intercepted telephone calls to refresh the witness' recollection, and (2) that the transcripts and recordings were themselves admitted into evidence. The answer to the first point is found, we submit, in the general rule, conceded by defense counsel at the trial (R. 38), that a memorandum may be used to refresh a witness' recollection even if it is itself not competent evidence. *Putnam* v. *United States*, 162 U. S. 687, 694–695; *Nicoli* v. *Briggs*, 83 F. (2d) 375, 378 (C. C. A. 10th); *State* v. *Hale*, 85 N. H. 403, 408; *Commonwealth* v. *McDermott*, 255 Mass. 575, 580–581.

With regard to the actual admission into evidence of the phonograph records and the corresponding typewritten transcripts, two courses of reasoning are open:

(1) If the witness testified to the conversation from an actual present recollection, refreshed by whatever means, the subsequent admission into evidence of records and transcripts which repeated

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[26] With the single exception noted at p. 45, *supra*.

what was already properly before the jury certainly cannot have harmed the defendants. Reason and statute alike forbid a reversal for so technical an error. U. S. C., Title 28, Sec. 391. See especially *United States* v. *Reed*, 96 F. (2d) 785 (C. C. A. 2d) certiorari denied, 305 U. S. 612 (intercepted telephone call testified to by parties and subsequently by interceptor); *Sneierson* v. *United States*, 264 Fed. 268 (C. C. A. 4th), certiorari denied, 253 U. S. 490, holding that the error, if any, in permitting certain stenographic notes to be read to the jury was nonprejudicial in view of the fact that the stenographer who testified could properly have used his notes to refresh his recollection; *Laughter* v. *United States*, 259 Fed. 94 (C. C. A. 6th), certiorari denied, 249 U. S. 613, holding that the denial of defendants' motion for return of papers seized in violation of the Fourth Amendment was error, but not prejudicial when the only paper introduced at the trial tended to prove a point otherwise established by competent testimony; and *Ableman* v. *American Sugar Refining Co.*, 9 F. (2d) 318 (C. C. A. 5th).

(2) If, on the other hand, the witness in reading the transcript to the jury is testifying not to a current recollection refreshed by the transcript but from a memorandum which embodies a memory he once had, then under well-established principles of evidence the memorandum itself is admissible. See, *e. g.*, *Schoborg* v. *United States*, 264 Fed. 1 (C. C. A. 6th), certiorari denied, 253 U. S. 494.

Defense counsel conceded the general rule at the trial but attacked the sufficiency of the foundation which had been laid for the use of the phonograph records and transcripts as memoranda of past recollection recorded (R. 33, 39). However, this point was apparently not urged before the Circuit Court of Appeals, and it is not mentioned in the petition or brief on the merits filed by petitioners in this Court. Accordingly, all objection to this material based on the memorandum rule must be deemed abandoned, leaving for consideration only the question whether the allegedly unlawful method by which the memorandum was prepared bars its use as an embodiment of the witness' recollection. Only by taking the extreme position that any illegality during the course of the pre-trial investigation vitiates the criminal proceeding can such a view be maintained. The testimony, whether present recollection refreshed or past recollection recorded, is still the testimony of the witness, a party to the conversation. Its weight depends on his credibility, not that of Federal officers who may have tapped the telephone wires. It is as if in the present case the witness had refreshed his memory before trial from the phonograph records sufficiently to testify as to the conversation without the assistance of either record or transcript, or as if the Government had learned the name of a material witness from an involuntary confession inadmissible under the Fifth Amendment. The testimony of such a witness could hardly be barred on this

ground. See *The King* v. *Lockhart*, 1 Leach 386, 168 Eng. Rep. 295 (Old Bailey 1785).[37]

It should be noted that the foundation for the challenged testimony was fully presented and the legal questions argued only in connection with Government's Exhibit No. 110. It is fair to assume that the same foundation could and would have been laid for the admission of subsequent phonograph records and transcripts, since it was agreed that the objections against Government's Exhibit 110 should apply to the others, and no new objection was made when thereafter the prosecuting attorney, as a matter of convenience and to save time, introduced the records and transcripts simply upon identification by the witness.

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[37] It is evident from a reading of the printed record that counsel, witnesses, and even the trial judge were uncertain as to the theory upon which the phonograph records and related transcripts were admitted into evidence. This uncertainty was the natural result of the doubt as to whether the records actually revived the present recollection of the witness. It would probably be impossible in the circumstances of this case to differentiate clearly between the witness' actual present recollection of having said something and his powerful conviction that he did say it flowing from a hearing of his own recorded voice. In this situation the distinction between refreshed present recollection and recorded past recollection becomes academic and it is not to be wondered that the trial court having asked the witness to "refresh his recollection word by word" should thereupon direct him to "read" the refreshing memorandum. In any event, objection on the ground that a refreshing memorandum is not ordinarily read into the record has been abandoned by petitioners both before this Court and before the Circuit Court of Appeals.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed, except as to the petitioner Krupp.[28]

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[28] As was pointed out in Footnote 1, p. 1, *supra*, this petitioner has died since the writ of certiorari was granted. In the cases of *List* v. *Pennsylvania*, 131 U. S. 396, and *Menken* v. *Atlanta*, 131 U. S. 405, which were criminal cases, the deaths of the defendants, who were plaintiffs in error in this Court, were suggested subsequent to the issuance of the writs of error. This Court held that the causes had abated and that the writs of error must be dismissed. See also *Lewis* v. *United States*, 216 U. S. 611; *United States* v. *Phillips*, 6 Pet. 776; *Jezewski* v. *United States*, 13 F. (2d) 599, 604 (C. C. A. 6th). However, in *Brownlow* v. *Schwartz*, 261 U. S. 216, 218, this Court indicated, in a civil case which had become moot, that "The practice now established by this Court * * * is to reverse the judgment below and remand the case with directions to dismiss the bill, complaint, or petition." See also cases cited in Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, pp. 437–438.

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Fifth Amendment provides, so far as pertinent:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Section 27 of the Radio Act of 1927 (the Act of February 23, 1927, c. 169, 44 Stat., 1162, 1172), provides:

> No person receiving or assisting in receiving any radio communication shall divulge or publish the contents, substance, purport, effect, or meaning thereof except through authorized channels of transmission or reception to any person other than the addressee, his agent, or attorney, or to a telephone, telegraph, cable, or radio station employed or authorized to forward such radio communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the radio communication may be

passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person; and no person not being entitled thereto shall receive or assist in receiving any radio communication and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcasted or transmitted by amateurs or others for the use of the general public or relating to ships in distress.

Regulation Nineteenth of Section 4 of the Radio Act of 1912 (the Act of August 13, 1912, c. 287, 37 Stat. 302, 307), provides:

Secrecy of Messages. Nineteenth. No person or persons engaged in or having knowledge of the operation of any station or stations, shall divulge or publish the contents of any messages transmitted or received by such station, except to the person

or persons to whom the same may be directed, or their authorized agent, or to another station employed to forward such message to its destination, unless legally required so to do by the court of competent jurisdiction or other competent authority. Any person guilty of divulging or publishing any message, except as herein provided, shall, on conviction thereof, be punishable by a fine of not more than two hundred and fifty dollars or imprisonment for a period of not exceeding three months, or both fine and imprisonment, in the discretion of the court.

Section 7 of the Interstate Commerce Act of 1910 (the Act of June 18, 1910, c. 309, 36 Stat. 539, 544–545), so far as pertinent, provides:

> * * * the provisions of this Act shall apply * * * to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, * * *: *Provided, however,* That the provisions of this Act shall not apply * * * to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid.

Consol. Laws N. Y., Chap. 40, § 552, so far as pertinent, provides:

> A person who:
>
> * * * * *
>
> 2. Being such clerk, operator, messenger or other employee [of a telegraph or tele-

phone company], wilfully divulges to anyone but the persons for whom it was intended, the contents or the nature thereof of a telegraphic or telephonic message or dispatch intrusted to him for the transmission or delivery, * * * except when such telegraphic or telephonic message or dispatch is in aid of or used to abet or carry on any unlawful business or traffic, or to perpetrate any criminal offense, and when it shall appear that any offense at law or unlawful business or traffic is being carried on or conducted in whole or in part by means of a telegraphic or telephonic message or dispatch, it shall be the duty of any corporation or employee having knowledge of the same, to withhold such dispatch from delivery, and to further furnish to any public officer whose duty it is to prosecute any offense at law so aided and abetted, all information in their possession, relating to said unlawful business or traffic; * * * and any violation of this section, or refusal or neglect to furnish information as provided hereinbefore, is punishable by a fine of not more than one thousand dollars or by imprisonment for not more than two years, or by both such fine and imprisonment.

Consol. Laws N. Y., Chap. 40, § 1423, so far as pertinent, provides:

A person who wilfully or maliciously displaces, removes, injures, or destroys:

* * * * *

6. A line of telegraph or telephone, wire or cable, pier or abutment, or the material or property belonging thereto, without lawful authority, or shall unlawfully and wilfully cut, break, tap, or make connection with any telegraph or telephone line, wire

cable or instrument, or read or copy in any unauthorized manner any message, communication or report passing over it, in this state; or who shall wilfully prevent, obstruct or delay, by any means or contrivance whatsoever, the sending, transmission, conveyance or delivery, in this state, of any authorized message, communication or report by or through any telegraph or telephone line, wire or cable, under the control of any telegraph or telephone company doing business in this state; or who shall aid, agree with, employ or conspire with any person or persons to unlawfully do, or permit or cause to be done, any of the acts hereinbefore mentioned, or who shall occupy, use a line, a room, table, establishment or apparatus to unlawfully do or cause to be done any of the acts hereinbefore mentioned * * *.

APPENDIX B

Pertinent portions of the unreported opinion of the United States District Court for the Eastern District of Missouri in *United States* v. *Bianco,* decided January 13, 1938, wherein the court denied a motion to quash the indictment:

* * * * *

Defendant relies upon the opinion of the Supreme Court, delivered by Mr. Justice Roberts, on December 20th, 1937, in the case of *Nardone et al.* v. *U. S.,* as an authority to sustain defendant's motion to quash. The opinion in the *Nardone* case states that Federal agents testified to the substance of intercepted interstate communications overheard by the witnesses who had intercepted the message by tapping telephone wires. It is our opinion that the decision in the *Nardone* case relates only to interstate communications. Section 605, Title 47, U. S. C. A., does provide in the second clause: "And no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." But that clause is to be read in connection with the other clauses, which refer specifically to interstate communications.

Odious and abhorrent as is the practice of the invasion of the privacy of the citizen by wire tapping, we feel that there is nothing in the *Nardone* case relative to intrastate

communications, which is what we have to consider in the case at bar; and we are bound by the opinion of the Court, rendered by Chief Justice Taft, in *Olmstead* v. *U. S.*, 277 U. S. p. 438, which opinion passes upon the question of whether or not wire tapping is in violation of the Fourth Amendment of the Constitution of the United States.

* * * * *

It is our opinion that the second clause of Section 605, which provides that no person, not being authorized by the sender, shall intercept any communication and divulge the same, relates only to interstate communications, and had Congress attempted to make such clause applicable to intrastate communications it would have been invalid.

For the reason that we believe the opinion in the *Nardone* case relates only to interstate communications, and that on the authority of the *Olmstead* case the common law still obtains as to intrastate communications, the motion to quash is overruled.

GEORGE H. MOORE,
U. S. District Judge.

U. S. GOVERNMENT PRINTING OFFICE: 1939

SUPREME COURT OF THE UNITED STATES.

No. 42.—October Term, 1939.

Joseph J. Weiss, Martin Gross, George Krupp and Maximilian Goldstein, Petitioners,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 11, 1939.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioners were indicted, with five others, in the District Court for the Southern District of New York for using the mails to defraud and for conspiracy so to use them.[1] The alleged scheme was to cheat insurance companies by inducing them to pay false claims for disability, health, and accident benefits to three of the defendants, Nelson, Berger, and Spitz. These three pleaded guilty and testified for the Government. Three defendants who were physicians,—Messman, Goldstein, and Krupp—were alleged to have assisted by furnishing policy holders false medical certificates and instructing them how to simulate illness. Messman pleaded guilty and testified for the Government. The other two stood trial. Two lawyers, Joseph J. Weiss, and Alfred L. Weiss, and an investigator, Gross, were charged with having furthered the claims knowing them to be false. Alfred L. Weiss was granted a severance; Joseph J. Weiss and Gross stood trial. Each of the petitioners was convicted and sentenced. The judgments were affirmed by the Circuit Court of Appeals.[2]

The conspiracy and scheme charged covered a period extending from January 15, 1934, to July 30, 1937, the date of the indictment. The principal issue of fact was whether the petitioners participated in making false claims with guilty knowledge. Over objection and exception, the trial judge admitted evidence of seventy-six intercepted telephone communications.

For months prior to the finding of the indictment telephone messages over the wires leading into the offices of Weiss and Messman in

[1] Under U. S. C. Tit. 18, §§ 338 and 88.
[2] 103 F. (2d) 348.

New York City, were intercepted. The wires were tapped by a policeman acting under instructions of a United States Post Office Inspector. The intercepted messages were taken stenographically and were also simultaneously recorded on phonograph discs by employes of a detective agency acting under the same instructions. Each night the records and stenographic transcripts of communications intercepted during the day were delivered to the United States Attorney or his representative. Interstate calls were made from Weiss' office and the tapped wires were the conduits of both interstate and intrastate communications. Every call, whether interstate or intrastate, to or from Weiss' office, was intercepted and recorded.

It appeared at the trial that one of the defendants who pleaded guilty had been confronted with the phonographic records and had then decided to plead guilty and become a witness for the Government. Others who had been informed of the Government's possession of the records did likewise. In the preparation for trial one of the defendants, who was to testify for the prosecution, held a typed copy of the stenographic transcript of a telephone conversation in which he had participated while a phonographic record of the conversation was played to him. He corrected the typed manuscript to make it conform to the words emitted from the phonograph. He then marked the phonographic record and the script for identification.

The Government's procedure at the trial in proving the communications was to call as a witness one of the defendants who had pleaded guilty, and to hand him a transcript he had marked for identification. After he had testified that, on a given date, he held a telephone conversation with one of the other defendants, he was asked whether he could repeat the conversation verbatim. Upon his stating that he could not do so without the use of the typed transcript he was permitted to read it to the jury. Subsequently the Government offered the identified phonograph records and typewritten transcripts in evidence and they were admitted. Certain of the records were played to the jury while each juryman held a copy of the typewritten transcript of the conversation. All of the communications in question are conceded to have been intrastate save one which, however, was not shown to have been interstate.

The petitioners' objections to the admission of this evidence were that it would violate Sec. 605 of the Federal Communications Act of 1934;[3] would violate the Fourth and Fifth Amendments of the Federal Constitution, and would be in the teeth of Sec. 1423, subdivision 6, of the Penal Law of the State of New York,[4] making wire tapping a crime.

Because of conflict of decision in the Circuit Courts of Appeal[5] we granted certiorari, limited to the "question whether the trial court properly received in evidence intercepted telephone communications."[6]

In *Nardone* v. *United States*, 302 U. S. 379, it was decided that Sec. 605 of the Federal Communications Act prohibited the reception in a federal court of evidence of interstate communications obtained by federal agents by tapping telephone wires. The petitioners assert, and the respondent denies, that the section bars evidence of intrastate communications similarly obtained. The Government further claims that, even if the section would otherwise bar the evidence, it does not have that effect in this case, because interception and divulgence of the messages put in evidence was "authorized by the sender" within the meaning of the section.

The section consists of four clauses separated by semicolons. The pertinent one is the second: "and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person;". Plainly the interdiction thus pronounced is not limited to interstate and foreign communications. And, as Congress has power, when necessary for the protection of interstate commerce, to regulate intrastate transactions,[7] there is no constitutional requirement that the scope of the statute be limited so as to exclude intrastate communications.

The petitioners and the Government alike refer to the context of the critical clause, and the legislative history of the Communications

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[3] c. 652, 48 Stat. 1064, 1103; U. S. C. Tit. 47, Sec. 605.

[4] Thompson's Laws of New York, 1939, Part I, p. 1909.

[5] Valli v. United States, 94 F. (2d) 687; Diamond v. United States, 94 F. (2d) 1012, and unreported opinion on petition for rehearing; Sablowsky v. United States, 101 F. (2d) 183.

[6] — U. S. —.

[7] Shreveport Case, 234 U. S. 342, 351, 353; United States v. Louisiana, 290 U. S. 70, 75; National L. R. Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 38.

Act, the former to demonstrate that all communications are protected from interception and divulgence, the latter to prove that the language of the Act must be more narrowly interpreted to cover only interstate and foreign communications.

In support of the petitioners' view it is pointed out that each clause of Sec. 605 is complete in itself; that in the first and third clauses, which deal with divulgence of messages by persons engaged in receiving or transmitting them, the communications are specified as "any interstate or foreign communication", whereas, in the second and fourth clauses, which deal with interception and divulgence of communications, the phrases used are "any communication" and "such intercepted communication." It is argued that the difference in phraseology must have significance; and, in support of the assertion that the variety of expression was not due to inadvertence, the petitioners call attention to the fact that Sec. 605 was taken over from Sec. 27 of the Radio Act of 1927,[8] which, referring to radio messages, used uniformly, in each clause, the term "communication" or "message" and nowhere qualified the designation by the use of the phrase "in interstate or foreign commerce."

The petitioners further urge that there is good reason for the distinction in the phrasing of the clauses in § 605 since persons employed by communication companies can distinguish between interstate and intrastate messages which they handle, whereas, inasmuch as messages of both sorts pass indiscriminately over the same wires, the interceptor cannot make a similar distinction and the only practicable way to protect interstate messages from interception and divulgence is to prohibit the interception of all messages.

The Government argues that a reading of the whole section makes it plain that to give the second clause the scope contended for by the petitioners will lead to incongruities and inconsistencies in the operation of the section. We find none such as are sufficient to countervail what appears to be the plain meaning of the second clause.

The Government correctly asserts that the main purpose of the Communications Act of 1934 was to extend the jurisdiction of the existing Radio Commission to embrace telegraph and telephone communications as well as those by radio. We are asked to hold that if Congress had intended to make so drastic a change as to

[8] Act of Feb. 23, 1927, 44 Stat. 1162, 1172.

regulate intrastate as well as interstate communication, both the legislative history of the Act and its phraseology would so indicate, whereas there is nothing in either to emphasize any such extension of authority. We think, however, that the legislative history does not serve to explain the difference in the wording of the various clauses of Sec. 605. In making the alterations in the phraseology of the similar section of the earlier act the Congress must have had some purpose. We cannot conclude that the change in the wording of two of the four clauses of the section was inadvertent.

The Government further contends that the Act, viewed as a whole, indicates an intent to regulate only interstate and foreign communication. The title and sections 1 and 2, with a single exception which serves to emphasize the distinction, expressly so declare. But we think these considerations are not controlling in the construction of Section 605. The Commission's regulatory powers and administrative functions have to do only with interstate and foreign communications. But Section 605 delegates no function and confers no power upon the Commission. It consists of prohibitions, sanctions for violation of which are found in Section 501.[9] We hold that the broad and inclusive language of the second clause of the section is not to be limited by construction so as to exclude intrastate communications from the protection against interception and divulgence.

We come, then, to the Government's second proposition,—that disclosure of the intercepted communications was "authorized by the sender" within the meaning of the clause. It is true that one or both of the parties to each of the admitted communications attested in the manner we have indicated to the intercepted conversations. This is said to amount to a consent to the divulgence of the subject matter and to satisfy the statute in that respect. We think the position is untenable. The Act contemplates voluntary consent and not enforced agreement to publication. The participants were ignorant of the interception of the messages and did not consent thereto. The contents of the stenographic transcripts and phonographic records were, prior to the trial, made available to Government agents and United States attorneys. This divulgence was not consented to by either of the

[9] 48 Stat. 1100, 47 U. S. C. Sec. 501.

parties to any of the telephone conversations. In the absence of such divulgence the Government would have been without the evidence embodied in the messages.

It is said, however, that, when some of the defendants pleaded guilty, elected to take the stand and to testify to the contents of the messages, they gave the authorization contemplated by the statute. We have already adverted to the method by which this supposed authorization was obtained. Certain of the defendants who were participants in the telephone conversations were informed of the Government's possession of the contents of their communications. Under the stress of this situation they determined to turn state's evidence. Messman's license to practice medicine has not been revoked; he was not required to plead to the indictment; he was paid a salary by the Government, first of $65.00 per week and later of $100.00 per week, amounting, in the total, to $3,237.12. Nelson's sentence was suspended. He was paid a salary of $50.00 per week. Berger's sentence was suspended. Spitz's sentence was suspended.

Statement of these facts is convincing that the so-called authorization consisting of the agreement to turn state's evidence, by some of the defendants after they had been apprised of the knowledge of their communications by the Government's representatives, and in the hope of leniency, was not that intended or described by the statute and emphasises the offensive use which may be made of intercepted messages, whether interstate or intrastate. It is not too much to assume the interdiction of the statute was intended to prevent such a method of procuring testimony.

We hold that Section 605 rendered the communications inadmissible, and that it was prejudicial error for the trial court to admit them either by permitting the defendants who turned state's evidence to read the transcripts or allowing the prosecutor to put the transcripts and phonographic records into evidence upon identification by the parties to the conversations.

We have no occasion to consider or decide the questions raised by the other objections of the petitioners to the admission of the evidence.

The judgments are reversed and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.